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Diamond Jubilee Meeting . . . Boston . . . August 23-28

Contents

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The President's Page

Robert G. Storey

■ Among the many interesting and important developments at the Mid-Year Meeting of the House of Delegates, the following are perhaps of greatest interest to the Bar:

1. *The American Bar Center* received a tremendous impetus through the decision of the Directors of the American Bar Association Endowment to appropriate $400,000 received under the will of William Nelson Cromwell toward the construction of the Bar Research Center. This means that, with the generous support of the lawyers of America, both buildings—the Administration Building and the Bar Research Center Building— may go ahead under simultaneous construction. This will save considerable money and will assure the American Bar Association of a permanent headquarters adequate to every need of the Association at this time and in the foreseeable future.

A highlight of the Mid-Year Meeting was the gathering of the State and City Directors of the American Bar Foundation Fund Campaign. These are the men who will lead the campaign for the $1,500,000 which must be raised as the gift of the American Bar itself to the future of its own Association. The campaign directors were shown a model of the buildings, situated in their beautiful location along the broad and tree-lined Midway. Enlarged pictures of the model gave the impression of imposing completed structures. The land area will only be partially utilized by these buildings. There will be adequate parking and garden space. And there is sufficient room for future expansion, if required.

If the enthusiasm of these campaign leaders for the building of this useful and permanent home for the American Bar Association can be imparted to the lawyers of America there is no doubt that the goal which we have set for ourselves can be met.

2. *Administration of Criminal Justice.*—What is more important to a man—his property or his liberty? We lawyers have the primary responsibility for assuring in this country effective, fair and prompt administration of criminal law. A tremendous step in the constant work of the American Bar Association in this field was taken by the House of Delegates through the establishment of a Committee with power and authority to make an over-all study of criminal justice in the United States and specifically to recommend (a) minimum standards of procedure and administration of criminal law; (b) appropriate means for the adoption of such standards; and (c) a consideration of the establishment of an Institute on Criminal Law. This project should be one of the historic achievements of the American Bar Association. I have every confidence that the Committee will fulfill the expectations of the House of Delegates in this exceptional action.

3. *Regional Bar Meetings*—The two well-planned and interesting Regional Meetings of the Association this Diamond Jubilee year deserve the support of all lawyers within the respective areas. They are:

a. The *Missouri Valley* Regional Meeting at Omaha, Nebraska, April 30, May 1-2.
   Clarence A. Davis, Lincoln, Chairman
   George H. Turner, Lincoln, Director

b. The *Blue and Gray* Regional Meeting at Richmond, Virginia, May 4, 5, and 6.
   Charles S. Rhyne, Washington, D. C., Chairman
   Lewis F. Powell, Jr., Richmond, Director.

Regional meetings have proved useful and popular features of the work of the Association and are now one of the annual objectives. They bring American Bar activities to lawyers in their home areas and constitute a workable scheme of decentralization. The meetings include workshops on practical subjects, Section programs of special interest to the sponsoring area, and study of current national and world problems. Each meeting will have recognized authorities to lead the discussion of the important legal matters in the program. Fellowship among lawyers who attend is emphasized, and entertainment will not be neglected. Officers of each meeting have provided side trips and social events of interest to lawyers and their wives. Not every lawyer can attend the American Bar Association Annual Meeting, but most lawyers within the appropriate areas can and should attend these Association Regional Meetings.

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The objects of the American Bar Association, a voluntary association of lawyers of the United States, are to uphold and defend the Constitution of the United States and maintain representative government; to advance the science of jurisprudence; to promote the administration of justice and the uniformity of legislation and of judicial decisions throughout the nation; to uphold the honor of the profession of law; to apply its knowledge and experience in the field of the law to the promotion of the public good; to encourage cordial intercourse among the members of the American Bar; and to correlate and promote such activities of the Bar organizations in the nation and in the respective states as are within these objects, in the interest of the legal profession and of the public. Through representation of state, territory and local bar associations in the House of Delegates of the Association, as well as large membership from the Bar of each state and territory, the Association endeavors to reflect, so far as possible, the objectives of the organized Bar of the United States.

There are seventeen Sections for carrying on the work of the Association, each within the jurisdiction defined by its by-laws, as follows: Administrative Law; Antitrust Law; Bar Activities; Corporation, Banking and Business Law; Criminal Law; Insurance Law; International and Comparative Law; Judicial Administration; Labor Relations Law; Legal Education and Admissions to the Bar; Mineral Law; Municipal Law; Patent, Trade-Mark and Copyright Law; Public Utility Law; Real Property, Probate and Trust Law; Taxation; and the Junior Bar Conference. Some issue special publications in their respective fields. Membership in the Junior Bar Conference is limited to members of the Association under the age of 36, who are automatically enrolled therein upon their election to membership in the Association. All members of the Association are eligible for membership in any of the other Sections.

Any person who is a member in good standing of the Bar of any state or territory of the United States, or of any of the territorial groups, or of any federal, state or territorial court of record, is eligible to membership in the Association on endorsement, nomination and election. Applications for membership require the endorsement of a member of the Association in good standing and are considered in each case by a Committee on Admissions of the appropriate state. If the applicant is a member of the Bar of the state or territory in which he resides or has his principal office, or is a member of a federal, state or territorial court of record of a state or territory in which he resides or has his principal office, the application is referred to the Committee on Admissions for one of such states or territories. If, however, the applicant is not a member of the Bar of the state or territory in which he resides or has his principal office, the application is referred to the Committee on Admissions for one of those states or territories or is referred to the Committee on Admissions for a state or territory in which the applicant formerly resided and to the Bar of which he was admitted. Upon the approval of an application by a majority of the proper Committee on Admissions, an applicant is deemed nominated for membership. All nominations made pursuant to these provisions are reported to the Board of Governors for election. Four negative votes in the Board of Governors prevent an applicant's election.

Dues are $16.00 a year, except for the first two years after an applicant's admission to the Bar, the dues are $4.00 per year, and for three years thereafter $8.00 per year, each of which includes the subscription price of the JOURNAL. There are no additional dues for membership in the following sections: Bar Activities, Criminal Law, Judicial Administration, Legal Education and Admissions to the Bar, and the Junior Bar Conference. Dues for the Section of Administrative Law, the Section of Antitrust Law, the Section of Labor Relations Law and the Section of Patent, Trade-Mark and Copyright Law are $5.00 a year; dues for the Section of Taxation are $6.00 a year; dues for all other Sections are $3.00 a year.

Blank forms of proposal for membership may be obtained from the Association offices at 1140 North Dearborn Street, Chicago 10, Illinois.

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A Court of Tax Appeals:

A Call for Re-examination

by **Walter L. Pope** • Judge of the United States Court of Appeals for the Ninth Circuit

■ A dozen years ago, several prominent members of the Tax Bar proposed that the Federal Courts of Appeals be relieved of their jurisdiction to review federal civil tax decisions and that jurisdiction over tax appeals be vested in a single court. The argument that followed demonstrated that most tax lawyers wanted no part of a court of tax appeals. Judge Pope calls for a re-examination of the basic question in this article, taken from an address delivered before the Section of Taxation at the 1952 Annual Meeting in San Francisco.

■ It was nearly 400 years ago that John Selden, the distinguished English jurist and legal author, speaking of the rules and maxims being developed in the then newly established court of chancery made his oft-quoted statement: "Equity is a roguish thing. For Law we have a measure, know what to trust to; Equity is according to the conscience of him that is Chancellor, and as that is larger or narrower, so is Equity. 'Tis all one as if they should make the standard for the measure we call a 'foot' a Chancellor's foot; what an uncertain measure would this be! One Chancellor has a long foot, another a short foot, a third an indifferent foot. 'Tis the same thing in the Chancellor's conscience."[1]

What John Selden was demanding was more certainty in a newly established field of jurisprudence. The derisive terms he used give some indication of the extent of his feelings of disgust with his then inability to predict the probable outcome of a suit in equity. A degree of uncertainty is an inevitable accompaniment of the creation of new areas of legal activity. The enormous growth of income tax law in the years since March 1, 1913, was bound to be characterized by a certain amount of that sort of thing. Just as Selden felt strongly about the lack of certainty in the equity system of that day, the members of the Bar and the public today make similar demands in the field of tax law.

Problems of tax liability (and here I refer primarily to income, estate and gift taxes) have some unique characteristics which make the need for certainty particularly urgent. Every lawyer is constantly reminding himself that a determination of tax incidence must precede the drafting of every legal instrument and the making of any move which his client is advised to take. He must, as far as possible, know the answers in advance. Hence, the question of tax liability is one of those matters in respect to which, in the words of Mr. Justice Brandeis: "It is more important that the applicable rule of law be settled than that it be settled right."[2] In an economy in which it is possible that an individual's combined normal tax and surtax may equal 88 per cent of his net income, the members of the public will not long endure a system of administration which does not reduce guess work to the minimum.

For a long time students of our tax system have been pointing out that a chief weak spot has been at the level of the Courts of Appeals. A primary object of criticism has been what might be called the "fan system" or the "inverted pyramid method" of reviewing Tax Court decisions. The Tax Court, despite its statutory designation as "an independent agency in the Executive Branch of the Government", nevertheless functions as a court. Furthermore, it is a court of nation-wide territorial jurisdiction. And yet, petitions to review its decisions move out fanwise to eleven different Courts of Appeals —those for the ten numbered circuits and the District of Columbia. Contrary to the usual plan of centering appeals from a broad base of trial courts to an appellate court at the apex, this system resembles an inverted pyramid. The interesting uses to which this system has been put were, some ten or twelve years ago, the subject of considerable trenchant criticism. And the suggestions for changes then made by the

1. John Selden (1584-1654), "Table Talk, Equity".

2. Brandeis, dissenting, in *Burnet v. Coronado Oil & Gas Co.*, 285 U. S. at page 406. *Cf.* Brandeis and Holmes, dissenting, in *Di Santo v. Pennsylvania*, 273 U. S. at page 42.

principal critics of the existing arrangement gave rise to rather violent controversy, in which the Association's Section of Taxation took a prominent part.

I refer, of course, to such leading articles as those published in 1938 and 1940 by Roger J. Traynor,[3] now an Associate Justice of the California Supreme Court, and in 1944 by Erwin N. Griswold,[4] now Dean of the Harvard Law School. Both of these men made recommendations for changes which included proposals that the Courts of Appeals be relieved of jurisdiction to review federal civil tax decisions, and that such jurisdiction be vested in a single court of tax appeals. The outcry over the specific proposals of these gentlemen was so loud, it was so plain that the Bar generally would have no part of either the Traynor or the Griswold plan, that the question of the validity of the criticisms of the present system was generally overlooked. Both men had shown, with considerable force and clarity, how the present system of reviews, under which the Commissioner is always on one side of every case, lends itself to conflict, uncertainty and delay in the ascertainment of the final, authoritative word upon controversial questions of tax law. But because their suggested remedies were apparently so unacceptable, the profession generally forgot the demonstration that what we now have is assuredly nothing about which anyone would be tempted to boast: "We planned it that way", but rather, something which, like Topsy, "just growed".

Present System Leads to Multiplication of Litigation

The space now available to me will not permit even a summary of the faults which these able critics found in our present procedures. Their points were thoroughly supported by many references to actual cases. To my mind their criticisms are as valid today as they were when made. It will be recalled that Dean Griswold illustrated his point by describing the supposititious case of a lawyer whose client happens to read of a Tax Court decision making favorable disposition of a case almost identical with that of the client. The client, with great elation, carries the report of the case to the lawyer, saying: "Now you see our problem is settled", to which the lawyer only shrugs his shoulders, pointing out that the Commissioner has declined to acquiesce and the client will have to carry his case to the Tax Court also. In due time the client again returns, now all smiles, for he has discovered that the Court of Appeals has affirmed the Tax Court's decision. Again the lawyer merely shrugs his shoulders, for he knows that the Commissioner may well simply wait for a favorable opportunity to take the same question before the Court of Appeals of another circuit. In fact, if the Commissioner loses in the next circuit he still has nine more circuits in which to seek a decision favorable to him. What the Commissioner is after, of course, is a conflict between circuits which, generally and practically speaking is the most likely way to procure a review by the Supreme Court.

We must not forget that although the rule laid down in *Dobson* v. *Commissioner*[5] has been replaced by statute, yet that opinion still stands as evidence of the Supreme Court's opinion of our tax appeal system. There, Mr. Justice Jackson said:

> The Tax Court decisions are characterized by substantial uniformity. Appeals fan out into courts of appeal of ten circuits and the District of Columbia. This diversification of appellate authority inevitably produces conflict of decision, even if review is limited to questions of law. But conflicts are multiplied by treating as questions of law what really are disputes over proper accounting. The mere number of such questions and the mass of decisions they call forth become a menace to the certainty and good administration of the law. To achieve uniformity by resolving such conflicts in the Supreme Court is at best slow, expensive, and unsatisfactory. Students of federal taxation agree that the tax system suffers from delay in getting the final word in judicial review, from retroactivity of the decision when it is obtained, and from the lack of a roundly tax-informed viewpoint of judges.

And at this point the opinion makes footnote reference to the following quotation from Magill, *The Impact of Federal Taxes:*

> At the present time, it is impossible to obtain a really authoritative decision of general application upon important questions of law for many years after the close of any taxable year. The average period between the taxable year in dispute and a Supreme Court decision relating thereto is nine years. Meanwhile confusion reigns in the day-by-day settlement of the more debatable questions of the tax law. One circuit court holds that a certain situation gives rise to tax liability; another circuit holds the contrary. The Commissioner and the lower federal courts are both confronted with the problem of reconciling the irreconcilable. A great part of the criticism of changing interpretations of the law announced by the Commissioner of Internal Revenue is properly attributable to the multitude of tribunals with original jurisdiction in tax cases, and to the absence of provision for decisions with nationwide authority in the majority of cases. If we were seeking to secure a state of complete uncertainty in tax jurisprudence, we could hardly do better than to provide for 87 Courts with original jurisdiction, 11 appellate bodies of coordinate rank, and only a discretionary review of relatively few cases by the Supreme Court.

How our review procedure continues to fail to produce reasonably prompt determinations of controversial points is illustrated by the decisions relating to family partnerships. In 1932, in the case of *Burnet* v. *Leininger*,[6] we had a foretaste of the later decisions in *Tower*[7] and *Lusthaus*.[8] The issue was kicked around in the Circuits for years—in the Sixth in 1932,[9] in the Fifth in 1933[10] (when certiorari was denied), and in the Second in 1937.[11] Any of these

3. Traynor, "Administrative and Judicial Procedure for Federal Income, Estate, and Gift Taxes —a Criticism and a Proposal", 38 *Calif. L. Rev.* 1393 (1938); Traynor and Surrey, "New Roads Toward the Settlement of Federal Income, Estate, and Gift Tax Controversies", 7 *Law & Contemp. Prob.* 336 (1940).

4. Griswold, "The Need for a Court of Tax Appeals", 57 *Harv. L. Rev.* 1153 (1944).

5. 320 U. S. 489.

6. 285 U. S. 136.

7. *Commissioner* v. *Tower*, 327 U. S. 280.

8. *Lusthaus* v. *Commissioner*, 327 U. S. 293.

9. *Commissioner* v. *Olds*, 60 F.2d 252.

10. *Kasch* v. *Commissioner*, 63 F.2d 466, *cert. den.* 290 U. S. 644.

11. *Humphreys* v. *Commissioner*, 88 F.2d 430.

cases would have furnished the Supreme Court an occasion to determine what it finally got around to in *Tower* and *Lusthaus* in 1946, only to have to clarify it in *Culbertson*[12] in 1949. Finally the rule was modified in the amending sections enacted in 1951. So here we are, ready to start all over. If the court of which I am a member decides whether the new sections apply to a family partnership, where all members of the family are in at the time of its formation, what will other Circuits do, and when can a Supreme Court pronouncement be expected? If the question first arises in the Tax Court, and our Circuit reverses, and the same question is again before the Tax Court in a case arising in Colorado, is the Tax Court expected to follow our decision, or stand by its own convictions until the Tenth Circuit speaks?

Up to now I have been endeavoring to make two points. Number one is, that this "weak spot" in our tax appeals system still continues. Number two is, that the fact that previous suggestions for change have failed to gain acceptance should not deter us from further study of the problem.

Objections to Court of Tax Appeals Boil Down to One

I have studied with some care the American Bar Association's reasons for opposing the Griswold proposals. It seems to me that when these reasons, serious as they appear to be, are analyzed, they all boil down to an objection to the immediate creation of a new court composed of judges as to whose judicial qualifications and ability there might well be some doubt in view of the probability of political considerations in the making of seven or nine nominations, at one time, and by a single appointing authority. I would not expect the members of the Bar to agree to take any such chance.

But this problem need not be handled in that way. We have adequate precedent in the legislation creating the Emergency Court of Appeals, whose personnel is designated, from time to time, by the Chief Justice of the United States who selects the members from the present judges of the existing courts, both circuit and district.

I think the members of the Bar might find some merit in a court of tax appeals, the members of which were initially selected in that manner. Such a court would have the prestige which would come from knowledge that its personnel was selected in a way calculated to give assurance that it would be staffed with the ablest judges our present system could provide.

I know that this suggestion will meet with protests on the part of some of my brother circuit judges. No doubt some of them will say they would rather be sentenced to hard labor in the salt mines than assigned to the task of continuously hearing nothing but tax cases, and that generally away from home. But there could be alleviating compensations. Thus I might suggest, perhaps a bit facetiously, that the court could sit in San Francisco in the summer, in New Orleans in the winter, and in New York during the theatrical season. And after all, it would be worth something to the circuit judges to have their own circuits relieved of these cases. More important is the fact that not only would the assignments to duty on this court be temporary, but further study might well show that it would be feasible to provide that the arrangement here suggested could gradually be replaced by a staff of permanent judges. A suggestion to be considered is that it be provided that during each successive biennium one permanent judge should be appointed to this court, so that, assuming a court of seven judges, in fourteen years the court would have its own permanent staff of judges. If appointments were made thus deliberately, and over such a period, an able court would be assured.

All that I am trying to suggest here is that the attainment of a better system of tax appeals is possible —that something can be done.

Once the Bar felt assured of an opportunity to be heard, in reviews of tax decisions, before a court composed of reasonably able judges, I think that most of the objections heretofore voiced against a court of tax appeals would be withdrawn. The argument that the judges ought not to be too specialized never was realistic. In the words of Mr. Justice Jackson in the *Dobson* case, we deal here "with a subject that is highly specialized and so complex as to be the despair of judges". The contention that it is better to arrive at the "right" decision which is more likely to be attained after the same problem has been passed upon in a number of Circuits, is, I should like to suggest, subject to serious question. For use prospectively, no particular rule can be said to be the "right" one. As a guide for the future, one answer is as good as another. And we all know that the chances are even that any time the Supreme Court

Cristof Studio

Walter L. Pope, Judge of the Court of Appeals since 1949, is a resident of Missoula, Montana, where he practiced law for thirty-two years. He was graduated from the University of Chicago Law School and has taught law at the Universities of Nebraska and Montana. He is a former President of the Montana Bar Association and at one time represented Montana on the old General Council of the American Bar Association.

12. *Commissioner v. Culbertson*, 337 U. S. 733.

finally gives its answer, Congress will promptly amend the Code to provide otherwise. By that time John Doe, the taxpayer, the only person with a real vested interest in a "right" answer, having long since lost his case in a court of appeals' decision rendered some years earlier, will hardly bother even to read the "right" decision which has now been handed down too late to do him any good. Again I say, it is "more important that the applicable rule be settled than that it be settled right".

The argument that the established circuit courts will supply valuable knowledge of local law may, but only by accident, have a basis in fact. Is there any reason why a taxpayer in Arizona would prefer to have his case heard by a division composed of Judges Healy, Bone and Pope, who have practiced law in Idaho, Washington and Montana, rather than by a court on which sit Judge Magruder, of Boston, Judge Maris, of Philadelphia, and Judge Swan, of New Haven? I think not.

When a court of the kind here envisioned had spoken, and certiorari was denied, the litigants would be at the end of the road and the members of the Bar would have their certain answer. To argue that such a court could not handle the present volume of tax cases would be beside the point, for the very purpose of the court would be to diminish the volume of appeals which the present system multiplies.

Because the plan here proposed is only tentative, and because I concede the probability that a better plan than mine can be devised by others, I do not propose to commit myself upon numerous details that must be worked out. After all, I think I should leave something for the committee to decide. Such, for instance, is whether the court of tax appeals should have exclusive jurisdiction to review not only tax court decisions, but also tax decisions of the district courts, or even those of the Court of Claims. Another question is whether such a court should sit in bank or in divisions. I decline to be bothered by such details.

I realize that I have been talking here about a subject which, while it interests me greatly, may not interest you at all—something which you might prefer to have remain buried.

If I may be permitted to mention the situation in which one circuit judge finds himself—I do not speak with respect to anyone other than myself—I think it should be noted that in that position I am compelled to be a jack-of-all-trades, and hence the odds are that I shall be master of none. Some day, just for fun, take a look at the list of things that make grist for our mill. Chapter 85 of Title 28, starts out with two sections on "federal questions", and "diversity of citizenship". How many different questions can arise under these two sections alone can only be appreciated after having lived with them. But this is only a starter. There follows enumeration of admiralty cases, bankruptcy matters, patents, copyrights, trade marks, and unfair competition, civil rights, eminent domain, and some nineteen other categories. Then, after you move over to Title 18—"Crimes and Criminal Procedure", you will still be far from finished. Ever since the Federal Trade Commission Act of 1914, generally speaking, whenever Congress has created another alphabetical agency it has picked on the circuit courts as the place for judicial review. And so, these work-horses of the federal court system must deal with the NLRB, the SEC, the FPC, the FCC, the CAB, and the FSA, not to mention Fair Labor Standards, the Federal Alcohol Administration, the Maritime Commission, and so on and so forth, all in addition to reviews of Tax Court decisions.

I do not object to all this constant change of topic. Indeed, it is not only interesting, but stimulating and exciting as well.

But with respect to the review of tax decisions, my limited experience, now only in its fourth year, has caused me to note two things. The first is the admirable way in which, practically without exception, counsel appearing in tax cases reduce the record, and condense the briefs, so as to eliminate all superfluous matters and bring the court, by the shortest possible route, to the final controlling point.

The second thing I note, is that notwithstanding the generally superior quality of this mode of presentation of these cases, their consideration usually fills me with grave uneasiness. If I were a businessman with a tax problem, I would hesitate about employing counsel whose general practice was marked by only occasional incursions into tax litigation. I should want my tax lawyer to be one who was not only saturated with learning in this field, but wholly immersed in the subject. And I should want the judge who decided my case to be as nearly as possible the same way. That is one reason why I think a court made up as I have suggested would render a superior performance.

In suggesting further study, with a view to providing something better, I am mindful of a statement made by Professors Surrey and Warren of Harvard and Columbia Law Schools in their casebook, prepared for the use of their students. They say:[13]

> There will remain for the courts the decision of those relatively few controversies which do not yield to the solvent of administrative mechanism. Such resort to the courts affords an umpire to maintain the proper balance between taxpayer and Government in the interpretation of tax laws. But the mechanism of umpiring must likewise be efficient, so that decisions can be rendered with relative promptness and certainty and do not in turn unnecessarily create new grounds of controversy.
>
> Our tax system on the whole does a creditable job in performing these functions. It can bear comparison, with quite favorable results, with that of any other nation administering a mass income tax. But the machinery can also bear considerable improvement. And certainly standing still as respects administration of its tax system is dangerous for a nation. The job of improving our tax administration is probably the largest and most important job that we face in the tax world.

I am sure that we are not for standing still.

13. Surrey and Warren, *Cases on Federal Income Taxation* (1950).

The Selection of Judges in England:

A Standard for Comparison

by **Morse Erskine** • of the California Bar (San Francisco)

■ The appointment of judges in England is much different from the American system. Through tradition and the strong influence of the Inns of Court, English judges are appointed without regard to political party, and any attempt to influence the Prime Minister and the Lord Chancellor in their selection would be very much frowned upon. It would be, of course, impossible to transplant the English system to American soil, as Mr. Erskine points out, but nevertheless the British example proves that politics can be largely removed from the Bench.

■ No one can doubt that our judges, state and federal, should be men of the highest quality. Dean Pound has said that the fact that our polity is a legal polity, operating according to law, not according to the personal will or judgment or inclination of any man, is its outstanding feature, the thing which distinguishes our system from the authoritarian regimes now existing in the world and which is most vital to the preservation of our freedom. "Laws", he says, "may be the instruments of the autocrat; law is incompatible with absolute power; law is the arch enemy of autocracy." And then he says: "Law, as distinguished from laws, calls for judges. A polity carried on according to law calls for judges of the highest order of character, ability and professional competence."[1]

It is likewise obvious that as society becomes more complex the necessity for good government becomes more imperative. Efficient and incorruptible courts, interpreting and applying the law and doing justice, are a vital part of good government. It is an essential means of maintaining a society which is fairly united and it is the best refutation of the cynical claim, as old as Plato, that in the last analysis justice is the rule of the strongest. Whether a society is to have such courts rests upon the quality of its judges. As Justice Cardozo said in *The Nature of the Judicial Process*, "In the long run there is no guaranty of justice except the personality of the judge."[2]

In view of the great importance of the subject, it seemed to the writer worth while to investigate when he was in London how the English select their judges and especially the part which politics and political influence play in their selection. It seemed particularly important to make an investigation in England because it is generally conceded that the English courts and administration of the law are among the best in the world.[3]

It is first necessary to have in mind the English courts and the officials who under the law appoint the judges to these courts. The highest courts in England are the House of Lords and the Privy Council. Next below is the Court of Appeal. Then comes the High Court having general jurisdiction. Lastly there are the county courts which are courts of limited jurisdiction. The judges of the courts above the county courts are all appointed by the Crown on the nomination of either the Prime Minister or the Lord Chancellor. As the Crown is bound to accept the advice of the minister making the

1. Pages ix-xi of Dean Pound's "Introduction" to the book by Evan Haynes, of the San Francisco Bar, *Selection and Tenure of Judges*. In this same introduction Dean Pound said:

> A technique of developing and applying laws is required and well organized ideals of the end of law and of the social order in which laws are to be applied are no less required. Thus, there is call for experience and trained reason on the part of those who apply the laws and regulations by the technique in the light of the ideals. Law is experience developed by reason and reason tested by experience. Only the judge experienced in the administration of justice, possessed of a trained reason, and habituated to employing it, can serve the ends of justice adequately. Maintaining the position of the judiciary in our polity by making and keeping it fully equal to its task in the urban industrial society of today is to maintain the law as the characteristic feature of our constitutional democracy. . . .

2. *The Nature of Judicial Process*, pages 16-17.

3. Although the writer did not attempt to investigate the point and cannot speak with any authority, the principal defect of the administration of the law in England seems to be its system of costs under which the losing party must pay all the expenses of the other side, including his attorney's fees. This doubtless discourages baseless claims and promotes settlements; but it has the great disadvantage, which seems to far outweigh any advantage it may have, that the risk of losing and hence of being obliged to pay high costs discourages or prevents prosecution of many meritorious claims especially by those who have only small means. If the outcome of the usual lawsuit could be foretold with any degree of certainty, there would be greater justification for the system; but any lawyer of experience knows that the other side always has something to say in its favor and that the result of litigation, even what appears to be a clear-cut case, is almost always uncertain to a greater or less degree.

The writer was told while he was in London that in recent years Parliament has adopted statutes under which small claims can be prosecuted without the claimant being exposed to the risk of being obliged to pay the fees of the lawyers on the other side in the event of defeat, and also that a committee of prominent judges and barristers is now studying the revision of the entire system.

nomination, the minister in effect makes the appointment. In cases of the judges who sit in the House of Lords, the Privy Council and the Court of Appeal, the Prime Minister makes the submission to the sovereign, whereas, in the cases of the judges of the High Court, the Lord Chancellor makes the submission. There is, however, little substance to this distinction because the Lord Chancellor is far more able to form an opinion with respect to who should be appointed and in practice the Prime Minister in making his submission seeks and follows the advice of the Lord Chancellor. The Lord Chancellor appoints all the judges of the county courts without any formal submission to the Crown.

Lord Chancellor Is a Member of All Three Branches of Government

There is no office in our federal or state governments like that of the Lord Chancellor. As everyone knows, the members of an English cabinet are also members either of the House of Commons or the House of Lords. The extraordinary thing about the Lord Chancellor is that he is not only part of the executive and legislative branches of the government (as a member of the Cabinet he takes part in executive functions and as a member of the government in the House of Lords, he explains and defends the government's position respecting legislation), but he is also a judge; he can sit on appeals to the House of Lords and the Privy Council, and he is president of the High Court, the Court of Appeal and the Chancery Division.

Lord Jowitt was Lord Chancellor for the six and a half years during which the Labour Party was in office. When in the election of October 25, 1951, the Conservative Party was returned to power, Lord Jowitt ceased to occupy that office. The writer, in mailing Lord Jowitt a letter of introduction, accompanied it by a letter stating that he was interested in finding out how in practice English judges were appointed, particularly to what extent politics and political influence played a part in their appointment. Lord Jowitt's reply stated:

> I think that I can fairly say that we have established a tradition in which "politics" and "influence" [in the appointment of judges] are now completely disregarded. The Lord Chancellor selects the man whom he believes to be the best able to fill the position. In my own case I had an unusually large number of appointments, and I can only recall appointing two men who were members of my own party.
>
> You must remember these facts which help in establishing the tradition. The Inns of Courts are completely independent of any governmental control. The Lord Chancellor has always been a barrister, and must be a barrister, and must therefore be a member of one of the Inns. He is in close touch with all that goes on in his Inn of Court. How should I have felt if I had made a lot of unworthy appointments, when I noticed the cold looks that I should have received when next I went to lunch at the Inn.
>
> Secondly, in practice, the Lord Chancellor would always consult with the Head of the Division to which he was called upon to appoint a judge. If I had to appoint a judge to the Queen's Bench Division, I should, in practice, always consult with the Chief Justice; if to the Divorce Division, with the President; if to the Chancery Division, with the senior Judge. In all my many appointments, I never in fact made one without the approbation of such a person. When it came to the Court of Appeal, I should consult the Master of the Rolls as to who was the most suitable person. . . .

Sir Albert Napier, the permanent secretary of the office of Lord Chancellor, recently prepared a paper describing that office in which he said much the same thing as Lord Jowitt as follows:

> The Lord Chancellor is the most appropriate Minister to advise on appointments and promotions for the very reason that he is a Judge and is qualified for that position by actual practice at the Bar. He knows by experience as an advocate, the nature and degree of the knowledge and kind of character and temperament which go to make the best judges. When he sits he hears eminent Barristers arguing before him. He is in almost daily touch as a Law Lord and a Bencher of his Inn, with the Lord of Appeal and other Judges and members of the Bar. The Bench of an Inn is a society where all are equal, and talk is free, and so far as precedence is necessary, it goes by date of election and not by rank. In such a society a bad appointment could not escape criticism, and if it were ever suggested to a Lord Chancellor that he should appoint or promote the wrong man for the wrong motive, he would know not only where his duty lay but that if he were to accede he would lose the respect of the whole profession.

As stated in Lord Jowitt's letter, he did have an unusually large number of appointments, eighty-one in all. At the time he ceased to be Lord Chancellor there were seventy judges in office who owed their selection to him. These seventy were the following: he had appointed (or it would be more accurate to say that he advised the Prime Minister to submit to the sovereign for appointment) seven out of a total of nine judges of the House of Lords and the Privy Council who are called Lords of Appeal in Ordinary, all of the eight judges of the Court of Appeal who are called Lords Justices, and the Lord Chief Justice, and the Master of the Rolls; and he had also appointed (that is, he directly submitted to the sovereign for appointment) twenty-five out of a total of thirty-seven judges of the High Court as well as appointing directly (without any submission) twenty-eight out of a total of sixty-three judges of the County Courts. In addition to these seventy he during his term of office had also appointed eleven judges who had retired, died or been promoted before he went out of office, thus making the total of eighty-one.

Something should be said in explanation of the remark made by Lord Jowitt in his letter that he could recall that only two out of his eighty-one appointments were members of his own party. In England they have nothing comparable to our primary elections and therefore there is no need for a man when registering to vote to declare his party affiliation. So when Lord Jowitt made this remark he did not mean what an American might infer he meant, that is that according to his recollection only two of his appointments were

registered to vote as members of his party while all the others were registered as members of the Conservative Party; but he meant that only two of his appointments were members of the Labour Party in the sense of being active in its party politics (as for example representing the Party in Parliament or acting on committees of the Party organization) and that the remaining seventy-nine were either members of the Conservative Party in the same sense or what can be called nonpolitical men who do not declare their politics and are free to vote for either party as they see fit. It is safe to say that the great majority of the seventy-nine belonged to the latter group.

Use of "Influence" Is Disapproved

Sir Albert Napier, in response to a question, said that letters from influential people supporting a candidate for a place on one of the appellate courts or High Court, are simply not written, and, if by chance the Chancellor does receive such a letter, it has quite the opposite effect from the one intended. The Chancellor knows the men who are qualified; he has, of course, many ways in which he can supplement his knowledge of them; and, as pointed out by Lord Jowitt, he consults with the chief judge of the division of the court to which the appointment is to be made; but he has the responsibility of making the appointment and an effort to influence him is strongly disapproved. In the case of appointments to the courts of limited jurisdiction, the County Courts, the Chancellor frequently does not know the men available for the places and so he seeks information from those who do know them; but he seeks the information; it is not given him by persons seeking to bring pressure to bear on him. But in the United States a candidate for an appointment to judicial office ordinarily mobilizes all the influence and pressure he can exert on the official making the appointment; and as part of his campaign he usually asks everyone he knows who he believes might have some influence to write or speak to such official in support of his candidacy.

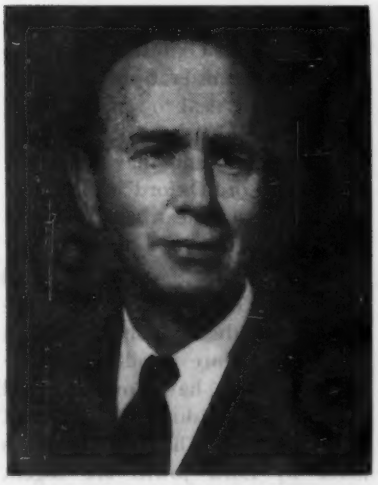
The English barristers with whom the writer talked were unanimously of the opinion that there is a firmly established tradition in England that the men best qualified by character, temperament and learning should be made judges; that politics and political influence should play no part in their selection; and that a violation of this tradition would be violently resented not only by the profession but also by the public generally. However, as we are considering a human institution, controlled by human beings with all of their passions and frailties, we should not expect a perfect adherence to this tradition or that those familiar with its operation should be in entire agreement with respect to departures from it.

For example, a very well informed barrister said that when the Earl of Halsbury, a man of strong Conservative convictions, was Lord Chancellor (he occupied that office from 1886 to 1892 and from 1895 to 1905) he tended to appoint judges who were strong Conservatives; but another barrister equally well informed stated that although the Earl of Halsbury did appoint as judges men who shared his economic and social views, he is usually criticized because two of his appointments turned out to be bad judges in different ways, one irascible and undignified and the other stupid and rather prejudiced.

As another illustration, a barrister with a thorough knowledge of the English courts said that when Lord Birkenhead was Lord Chancellor from 1919 to 1922, he was inclined to put on the Bench barristers who had come from Wadham College which was the college of Oxford he had attended; but another barrister with just as good knowledge stated that this was not so, that Lord Birkenhead had appointed one judge who had been to Wadham College, but no more than that.

The writer was likewise told that when a vacancy in a high judicial office occurs, it is quite usual to appoint the Attorney General of the party then in power to the place. It could be claimed that this practice, to the extent to which it has been followed, seems like the rewarding of a political figure for his services to his party. But the writer was also informed that no one would be appointed Attorney General unless he was a man of high character and great experience and fit in every way to occupy one of the highest judicial offices, and that consequently it is entirely logical and proper that he be given a high judicial office if he can be spared from the government.

It is likewise true that the tradition that political influence shall play no part in the appointment of English judges and that only the best men shall be selected is not one that was established without a struggle or has existed for a long period. Mr. Evan Haynes, of the San Francisco Bar, in his excellent book, *Selection and Tenure of Judges*, says that more than a century ago Lord Brougham in a speech on the state of the law, lamented the custom by which only the adherents to the party of the Ministry of the day were



Morse Erskine is a native of San Francisco, where he was born in 1895. A graduate of the University of California, he was admitted to the California Bar in 1917. He is a member of the Bar Association of San Francisco, the State Bar of California and the American Bar Association.

considered for judicial appointment; that when Lord Oxford and Asquith was Prime Minister from 1907-1916 he did a great deal to remove political considerations from the selection of judges; and that even after the day of Lord Oxford and Asquith complaints were heard that political favor was playing its part in their selection.[4]

However, it can be said with confidence that the English, despite an occasional failure to adhere strictly to the tradition, have now succeeded in firmly establishing it as part of their system. The appointments made by Lord Jowitt are cogent proof of its existence.

Inns of Court Maintain Tradition of Nonpolitical Appointments

As pointed out by both Lord Jowitt and Sir Albert Napier in their statements quoted above, the English Inns of Court were and are a potent influence in establishing and maintaining the tradition. These Inns of Court are extraordinary and typically English institutions. There are four of them, the Inner Temple, the Middle Temple, Gray's Inn and Lincoln's Inn. Every English barrister must be a member of one of the Inns of Court. Each Inn admits to practice the barristers belonging to it and disciplines or disbars any of its members found guilty by it of any violation of the law or ethics. Each Inn is governed by its Benchers; and the Benchers fill any vacancy occurring among their members. If any judge of an Appellate Court or the High Court is not a Bencher of his Inn at the time of his appointment, he is made a Bencher at the first opportunity. The Lord Chancellor is a Bencher of his Inn.

This incident which recently occurred illustrates the control of the Inns over their members. It appears that two of the judges of the High Court were considering resigning to return to practice to increase their incomes; but that they were advised by the Benchers of their Inn that they could resign if they pleased but that they could not resume practicing law because the fact that they had been judges might give them an unfair advantage in practice and so would be contrary to a sound administration of the law. Nothing exists in America which would prevent or influence a resigned judge from resuming practice, but such are the powers of the Inns over their members. The extraordinary fact is that their powers do not rest upon any statute but only on custom and that they are not subject to any governmental control. Only in England where customs and tradition acquire the force of law could such institutions exist.

The statements of Lord Jowitt and Sir Albert Napier which have been quoted make it clear that the Inns of Court exercise their strong influence in maintaining the tradition by what can be called social pressure. It will be remembered that Lord Jowitt said in effect that if he had made unworthy appointments, he could have been made to feel the strong displeasure of his fellow Benchers of his Inn; and Sir Albert Napier stated that the Bench of the Inn would not hesitate to let the Bencher who happened to be Lord Chancellor know that if he made a bad appointment "he would lose the respect of the whole profession". Luncheon with the Benchers of the Middle Temple showed how sound these statements were. There were at the luncheon barristers who had grown old in the practice of the law and there were younger men at the height of their powers. Lord Jowitt, who as already stated, was the Lord Chancellor of the Labour Government, was there; and so was the Attorney General of the present Conservative Government, and so were several judges. The atmosphere was entirely informal and friendly. There was no sign of any special deference to any one because of his rank or position; and, to use Sir Albert Napier's expression, talk was free. There could be no doubt that these men would strongly resent the appointment to the Bench for political or other unworthy reasons of a man not fully qualified. It was equally clear that they knew one another well and respected and liked one another; that they would not hesitate to criticize any one of their number who happened to be Lord Chancellor if he made a bad judicial appointment; and that the Lord Chancellor would value the esteem of his fellow Benchers and would hesitate a long time before offending them by making such an appointment.

Although the Inns of Court, by their strong influence on their members, do much to sustain the tradition, it is doubtless true that the tradition would not be effective for any long period of time without the support of public opinion. Such support is given wholeheartedly and with deep conviction. It can be said of the English that they do more than understand intellectually that the stability and freedom of their society demand that their judges be men of high character and be appointed without regard to politics; that they have an emotional conviction that this is so. They have "in their hearts recognized the bonds of law and society".

We have a great deal to learn from the English so far as the selection of judges is concerned. One thing which we can learn from them is that judicial and professional opinion should be given weight in the selection of judges because no one knows better whether a lawyer possesses the character, learning and temperament to be a judge than the judges before whom he practices and his colleagues at the Bar. But the most important thing we can learn from them is that a society can create standards, a tradition, requiring the appointment of qualified men to judicial office without regard to politics or political influence, which a politician possessing the appointing power will disregard at his peril.

Now let us in America ponder the fact that out of eighty-one appointments made by Lord Jowitt only two were members of his party in the sense which has been described.

(Continued on page 348)

4. Haynes, *Selection and Tenure of Judges*, pages 145-148.

The Disposition of Partnership Interests: Considerations on Death of a Partner

by **Thomas S. Edmonds** • of the Illinois Bar (Chicago)

■ The problems that arise in a partnership at the death of one of the partners are multitudinous, and today's high income and estate taxes have only multiplied the headaches of the surviving partner. Mr. Edmonds' article lights up some of the pitfalls and explains the advantages and disadvantges of the various choices open to the surviving partner.

■In planning the disposition on death of a partnership interest, four alternatives are presented: liquidation of the partnership business, sale of the decedent's interest to the surviving partner, continuation of the business and its incorporation.

If no other alternative is selected, the business must be liquidated, for the death of a partner dissolves the partnership. Unless the parties agree otherwise, liquidation is obligatory. Accordingly, in a vast number of cases the partnership is wound up, that is to say, liquidated.

Under the laws of most states the winding up of the partnership is imposed upon the surviving partner. His powers and duties are governed by probate and partnership laws, which grant him only such powers as are reasonably necessary for liquidation. If, therefore, the circumstances of a particular business make it advisable that he be granted extraordinary powers, the partnership agreement should so provide, for any acts in excess of his powers will be at his peril. For example, assuming one of the assets of the partnership to be an inventory of metal which is best sold through its manufacture into a finished product, the surviving partner may well hesitate to undertake the risks of manufacturing in the absence of express authorization.

A difficult problem of liquidation is "self-dealing". The surviving partner acts in a dual capacity; he is both a fiduciary and an interested party, and frequently is the most logical purchaser of partnership assets. It is indispensable to every legal contract that there be two parties competent to act. Unless the surviving partner is specifically authorized to purchase partnership property, he is not permitted to do so. He can, however, make such a purchase at a judicial sale or, if authorized to do so, by a court of competent jurisdiction. In some states probate courts lack jurisdiction to authorize such a sale, so that it is necessary to invoke the jurisdiction of a court of equity in a plenary proceeding. Such proceedings involve additional expense, frequently out of proportion to the amount involved.

It is, therefore, advisable that "self-dealing" be covered by the partnership agreement. It is desirable to set forth in some detail the property to be sold and the mechanics of sale. The agreement might provide for the giving of personal notice to the executor of the decedent's estate, for a publication notice in a designated newspaper, and for the other terms of sale.

Another difficult problem in connection with liquidation is the disposition of good will. In the absence of contrary provisions in the partnership agreement, good will must be accounted for by the surviving partner. This requirement is naturally subject to exception in case the good will has no value. Ordinarily, the test of its value is whether or not it would be salable at a judicial sale. Simple as this rule may seem, it leads to controversy.

If the good will is of no value, the partnership agreement should so state and should in addition provide that all interest therein shall pass to the surviving partner.

It is contended that under some circumstances the estate's share of income earned prior to death should be includable in the subsequent-to-death rather than the prior-to-death income tax return. The contention assumes a direction in the partnership agreement that the business be continued until the end of the partnership's taxable year.

Although this is vigorously opposed by the Government, occasionally an estate will actually benefit by the splitting of its partnership income between two taxpayers, the

decedent and the executor. If, however, all of its partnership income earned during the decedent's lifetime is chargeable to the prior-to-death period, a loss occurring during the decedent's lifetime is not permitted to be offset to a profit derived subsequent to his death. Also assuming the Government's position is sustained, if the partnership is on a fiscal and the decedent a calendar year basis, more than twelve months' income may be includable in the prior-to-death period. In the appropriate case, however, the partnership agreement should direct continuation of the business to the end of the taxable year, so that the estate may benefit from a subsequent determination of the question.

Buy-and-Sell Agreements May Be Important

Let us now consider sale of the decedent's interest to the surviving partner.

In the absence of provision for sale in the partnership agreement, the sale will be governed by the decedent's will and by probate law. Although sales sometimes are effected without authorization of the partnership agreement, failure to provide authorization may delay or jeopardize the sale. In such cases reliance on testamentary powers may be occasioned by probate law restrictions on the amount of credit which can be given in the sale. Since no fiduciary is protected in exceeding his powers, an executor should be reluctant to make such a sale in the absence of clearly expressed powers.

Even though adequate powers be granted by the will, delay in admission of the will to probate, threat of a will contest, the possibility that the surviving spouse may renounce the will, and the further possibility that the estate may prove to be insolvent may induce the surviving partner to liquidate the business rather than to purchase the deceased partner's interest. These considerations, as well as the desirability of the estate's being assured of the sale of its interest, illustrate the importance of a buy-and-sell agreement made during the partners' lifetime.

The carrying out of a buy-and-sell agreement is more difficult in the case of a partnership than in the case of a corporation. In most instances the only practical means of completing the sale is by funding the agreement with life insurance. While in the case of a corporation this is usually accomplished by having the corporation pay the premiums and act as the purchaser of its own shares, this is ineffective in the case of the partnership. One principal difficulty as to a partnership arises from its income being taxable to the individual partners and the necessity that they pay the premiums on the life insurance. Although this of course curtails their ability to carry adequate insurance during a period of high taxation, in most instances sufficient insurance may be carried to effect the purchase of a substantial part of the decedent's interest. As will be shown later, the solution of partnership problems sometimes depends on a combination of remedies, such as a buy-and-sell agreement as to part of the decedent's interest and liquidation or continuation as to the rest.

It is desirable that the buy-and-sell agreement establish value for federal estate tax purposes; otherwise the estate will be confronted with the difficulties attendant on valuation of a closely held business. To accomplish this purpose, sale during lifetime as well as upon death must be covered. This may be effected by a direction that if either partner wishes to sell his interest during lifetime, he must first offer it to the other at the price or pursuant to the formula provided in case of sale at death. The agreement should not be terminable on short notice by one partner for otherwise it will not establish value for tax purposes.

Binding agreements fixing the price at death will not necessarily accomplish the desired purpose when the sale is to a person who is a natural object of the decedent's bounty. In such a case the agreement will control as to value for tax purposes only if supported by a full and adequate consideration.

In a buy-and-sell agreement the purchase price must either be designated in dollars or there must be set forth a method of computing it. To the fiduciary administrating an estate, a fixed price is more satisfactory. In most instances this will not produce a fair sale price, since changing conditions of the business will necessitate constant revision, a task which experience has shown partners are unwilling to perform. Consequently, it is customary to determine the purchase price by a formula based on earnings, book value or a combination of both.

A method in common use is to base the purchase price on good will, tangible property and intangible property. To compute the value of good will, the first step is to determine by use of audit reports of the partnership accountant the average annual net earnings of the partnership for the five taxable years immediately preceding the partner's death. Then an allowance is made for the partners' salaries. When the average annual net earnings, less salaries, are so computed, they are multiplied by a factor and the result is the value of good will to be used for the purpose of determining the purchase price. Experience indicates that the factor will vary from 1 to 3 depending on the type of business. Thus, in a stock exchange brokerage house the factor will ordinarily be 1, whereas in a manufacturing business it will be between 2 and 3.

An alternative method of computing the value of good will is to base it on a multiple of excess earnings over an agreed return on net tangible and intangible assets. The first step is to set forth the agreed return in terms of a percentage, such as 10 or 12 per cent and the multiple to be used. Audit reports for the five full years preceding death are next used to determine the value of assets and debts, the debts being deducted from assets in order to determine the average annual net assets. The agreed return is then ascertained by applying the designated percentage to the average annual net assets. The result is then subtracted from the average net earnings for the five-year period

and the amount remaining is multiplied by a factor, such as 6, to compute the value of good will.

The determination of the value of tangible personal property by a designated appraisal company and the value of intangible assets by a specified accounting firm should be directed. Substitute appraisal companies and accounting firms should be appointed to act in case the firms initially designated decline or are unable to act. The value of good will, tangible and intangible property is then added and the partnership debts deducted. The result is the value of the business.

A helpful supplement to buy-and-sell agreements is the partnership insurance trust agreement. The *modus operandi* is for the life insurance benefits to be made payable to the trustee. The proceeds when collected are applied in accordance with the terms of the agreement. In effect it provides collateral for the carrying out of the agreement and to some extent is a medium for the settlement of controversies.

Use of Insurance Policy Options Has Obvious Advantages

Insurance trust agreements are sometimes used to enable a decedent's beneficiary to receive the benefit of an insurance policy option such as a provision for the payment of income during the remainder of a beneficiary's lifetime. Obvious advantages in such methods of payment are income tax savings and facility in carrying out the decedent's wishes.

If insurance proceeds are payable to the surviving partner, the decedent's wife cannot receive the benefit of such an option. Consequently an insurance trust is sometimes used to accomplish this purpose. Four methods are in common use:

A method frequently employed is to have both the insurance trust agreement and the policy provide that the trustee shall be the principal and the insured's dependent the contingent beneficiary, settlement to the dependent being under an income option. The dependent's interest is conditioned upon the trustee's not making claim for the entire proceeds. In effect, the dependent's income interest relates only to such part of the insurance proceeds as shall be released by the trustee. Thus the trustee is enabled to secure such of the proceeds as are necessary to carry out the agreement and may obtain releases from the executor or administrator by paying claims against the decedent's estate.

A second method of procedure is to have the policy held by the trustee for a stated period on interest option, during which period the trustee is empowered to withdraw funds for the purpose of carrying out the agreement. At the end of the stated period, the remainder of the funds is held for the insured's dependent under an income option.

A third method is to designate the trustee as sole beneficiary to receive payment in one sum. The trust agreement provides that by amendment each insured may direct the trustee not to demand any more of the proceeds than is necessary to carry out the agreement. By amendment the insured may direct the trustee to exercise a stated option for the benefit of designated persons, such as an income option for the benefit of the insured's wife.

Each of the three methods requires the co-operation of insurance companies. Officials of various companies have their individual preferences as to methods to be used, so that it is advisable to consult with the company's representatives before adopting any specific plan.

It should be noted that some companies restrict or prohibit the use of options by trustees. When the policies are of various companies, it may be necessary to provide for use of different methods in connection with the various policies.

A fourth method is sometimes used but is looked upon unfavorably by insurance companies. The following is an example: the primary beneficiary is the insured's dependent, let us say his wife. The policy settlement provides income payment in accordance with an option. After the policy is issued it is then assigned to the insurance trustee. The insurance trust agreement provides that the trustee may demand payment only to the extent necessary to carry out the agreement. The agreement further provides that if the business interest is transferred and all requirements are met, the trustee is to release the assignment. This enables the insured's wife to receive the income payments.

This method is not widely used because of fear that it may lead to litigation. It is useful, however, when a company declines to approve other methods.

A difficulty in working out a buy-and-sell agreement may be that a partner has become uninsurable, even though he may have substantial existing insurance acquired by him previously. The uninsurable partner may seek to use his existing insurance for the purpose of the agreement. In most instances this use will be inadvisable.

If existing policies be used, provision should be made for the reimbursement of the insured for premiums paid by him. Otherwise he will be providing part of the purchase price for his own stock. Also, as a consequence, the transaction may

Fabian Bachrach

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constitute a taxable transfer for federal estate tax purposes. In such cases there should be considered the taxability of the insurance proceeds and the base of the surviving partner as to the acquired interest for income tax purposes.

Originally the Commissioner sought to subject to the federal estate tax both the insurance and the partnership interest. Unquestionably, taxation of the insurance is warranted if the decedent retained incidence of ownership, if he paid the premiums or if the policy is payable to his estate. In such cases, to the extent of the insurance proceeds, the partnership interest should not be subject to tax.

The chief danger in the use of existing policies pertains to income taxes. If the insured assigns the policies for value to the other partners, the insurance proceeds less the actual cost to the surviving partners will be subject to income taxes. Assuming no assignment, but an agreement that the insurance proceeds are to be payable to the other partners, is this tantamount to assignment? There is danger it may be so treated. Consequently, until there are adequate reported decisions on the subject, this type of arrangement should be avoided.

Continuation of Business Should Be Considered

Consideration should be given to the continuation of the partnership business. Here again ordinarily the terms should be covered both by the will and the partnership agreement, for the probate laws of most states make no provision at all for continuance.

Provisions directing continuation may not necessarily accomplish the desired purpose for it has been repeatedly held that specific performance of such agreements will not be granted. Even though recovery may be had for failure to perform, the amount of damages is difficult to prove. Therefore, the partnership agreement should contain an adequate liquidated damages provision. When this is supplemented by a testamentary direction requiring the executor to comply with the agreement, danger of nonperformance is reduced to a minimum.

The partnership agreement should specify whether the interest to be acquired is one of general or limited partnership. If the estate is to participate in management, its interest must be one of general partnership. In view of the individual liability imposed by general partnership, this type of interest should be used only when the executor and legatee is a person suited to the carrying on of the partnership business and willing to accept the hazards.

In most instances the estate's interest will be that of a limited partner. In this manner the estate will be relieved of the possibility of incurring partnership liabilities.

The question is frequently asked whether a partnership interest may be held in trust. Whatever may have been the rule at common law, it is now apparent that it may be so held, although some slight doubt as to this was recently aroused by a federal district court case involving income taxes.

Bases for income tax purposes should be considered. If the partnership agreement contains no provision for continuance and the business is continued after the partner's death, the estate's base for gain or loss is date-of-death value, although that of the surviving partner is adjusted cost. Since this will apply not only to capital but also to all other assets such as inventory, the keeping of two sets of books may be required. If, however, the partnership agreement directs continuation, *date-of-death value will apply only to the decedent's partnership interest and not to the component assets of the business.* In such cases in the sale of inventoried assets, cost and not date-of-death value will be used. However, in the case of the sale of the decedent's interest in the partnership, the base will be date-of-death value. The importance of a provision directing continuation is therefore apparent.

If the partnership is a member of a stock exchange, the rules of the exchange should be considered, for compliance with these rules may determine the extent of business which can be transacted by the partnership. The New York Stock Exchange has published for its members a supplement to its rules containing useful information as to provisions to be contained in partnership agreements of exchange members.

A Few Words of Caution on Incorporation

It is unnecessary to consider at length the fourth alternative—incorporation. Generally speaking, the problems of incorporation are similar to those which would occur if the parties incorporated during their lifetimes. A few words of caution would be appropriate. The partnership agreement should leave the details of the incorporation to the surviving partner, who should be granted full power to carry out the general purposes of the agreement. If continuation or incorporation be directed, it is always possible that the individual assets of a partner other than his partnership interest may be insufficient to pay debts, death taxes and expenses of administration. This may result from increase in value of the partnership interest or decrease in value of the partner's other assets.

In almost every instance, therefore, an escape clause should be provided, to the effect that if the deceased partner's other assets are insufficient to pay debts, death taxes and expenses of administration without recourse to the partnership interest, the provision for continuation or incorporation at the election of the executor or administrator is to be of no effect. In some instances it may be desirable in case of the insufficiency of assets to grant the surviving partner an option to purchase a sufficient portion of the deceased partner's interest to provide for these expenses. If such an option be exercised, the provisions requiring continuation or incorporation will remain fully effective.

If a buy-and-sell agreement is impracticable, the parties may grant

(Continued on page 350)

Electronics in Court:

Shorthand Reporters v. Recording Machines

by **Everett G. Rodebaugh** • Chairman of United States Conference of Court Reporters

■ In a mechanical age, it is perhaps easy to become overenthusiastic about the products of man's ingenuity. A mechanical court reporter, a sound recording machine, picking up every word and phrase uttered during a trial would seem to be the ultimate in accuracy and infallibility. There are certain disadvantages in relying upon sound recordings that make it desirable to wait before all court reporters are replaced with robots. While Mr. Rodebaugh's subject is not a legal one, it is nevertheless a subject that concerns lawyers and judges.

■ As a member of the Committee on Electrical Recording of the National Shorthand Reporters Association, I recently received and read with great interest a letter from an earnest fellow-worker, who expressed in that letter his conviction that the sound-recording machine is destined to take over from the court reporter the recording of spoken proceedings, so that we may soon reach that ideal state where "we will no longer need to waste our energy in writing these meaningless pages of shorthand which are eventually thrown away".

We should carefully examine that proposition because if that is a good prophecy we shall have to consider also the fact that shorthand reporting as a profession now depends upon the ability to write those pages of shorthand by pen or by machine. And if that ability is to be no longer required the numbers of "reporters" will no longer be a handful and they can become a host.

I know that my correspondent will not take it amiss if I remark that he approaches this problem from the point of view of the extreme advocate of the use of sound recording, and I feel sure, too, he will understand me when I remark that one who assumes the extreme position on any question must stand somewhat exposed, somewhat overborne by enthusiasm or conviction, and that he must risk the possibility that others may wonder whether he is not a lover of earnestness rather than of truth.

This enthusiast apparently believes that shorthand reporting will become obsolete, perhaps in the near and foreseeable future. That is a debatable point, and no one can lift the curtain of unborn events to settle that debate. But it is a fact that the sound recorder is here and everyone affected by that fact must do something about it. We must decide to use it or to eschew it, and if we decide to use it we must decide what is truth and what is only earnestness.

It is at this point that I would suggest to my correspondent that he is living in a sound-recording dreamland, a dreamland from which he may one day wake to reality, a reality which he may find cold and inhospitable. Because if his assumption is right, if the sound-recording robot can be so clever that it does not need our skill—the peculiar skill of the court reporter—that it can become our Frankenstein, then he is dispensable, I am dispensable, and every other court reporter is dispensable. And surely, as soon as commissioners and legislators and judges and dispensers of patronage come to know that that is true—if it be true—the court reporter will have lost that security which has always been peculiar to his function; and his job, his work, will be handed out to anyone, and sometimes on the basis of friendship or expediency. Perhaps a fortunate reporter can maintain his place. But if it be true, as my friend writes, that with proper adoption of sound recording "shorthand is utterly worthless and foolish" he will have lost any peculiar claim or right to that place.[1] However, I make this observation only as an aside, an aside important only to the court reporter who may be subject to displacement. Whether the reporter is displaceable

1. The handwriting on the wall appears in this paragraph from a labor agreement signed between a contracting company and Local 1212, International Brotherhood of Electrical Workers, A.F.L., on April 7, 1952, (as related in the *New York Times* of November 24, 1952) applying to the United Nations Headquarters in New York City:

"The work covered shall include all work in connection with radio equipment, i.e., installation, operation and maintenance of radio broadcast, television, facsimile, audio equipment, and any apparatus by means of which electricity is applied in the transmission, transference or reproduction of voice, sound or vision with or without ethereal aid. Disc, film, wire or tape editing and recording and playback operations are deemed to come within the terms of this agreement."

does not bear on the problem of how verbatim reporting can best be done. There is abundant historical evidence that progress often brings ill fortune for some, but good fortune to many more. The important question to everyone concerned is whether verbatim reporting shall be done by the court reporter, or by the robot, or by the court reporter with the help of the robot.

Recorder Helps Reporters

Meantime, while that question is pending, I do not believe that the court reporter should blackball the robot, and indeed the recorder is being used by many reporters today. If the sound recorder can help the reporter make a better transcript it is another tool for him to use, and another tool that will be used.[2] I do suggest, though, that the robot salesmen do not need our help. They need the help of no one. They have ample energy and boundless enthusiasm. They need promise only another miracle in an electronic era that has taught people to believe in miracles. And the salesmen have not been idle.

The salesmen have succeeded in selling the Insular Government of Puerto Rico forty-nine recorders and forty-nine transcribers, at a cost said to be about $800 per unit, under a contract that called for installation in all the district courts of Puerto Rico by October 15 of 1952. Although this installation did not displace court reporters (because under the former court system of the island no records were made of such proceedings) that installation, made for economy, assumed the dispensability of the court reporter. It is the aim to use the sound-recorder record as the basis for appeals from the district courts to the superior and supreme courts of Puerto Rico. No court reporter is to be employed. The machine is to be operated by the district judge, who will replace recording belts when necessary and who will have a foot pedal to stop[3] and start the robot. It is not a sound objection to say that the district judge will not put up with this distraction and annoyance, because either in that court, or in another court where a similar installation may be made, the judge can delegate a clerk or a marshal to wait upon the machine. The point is that a substantial investment has been made on a hope: the hope that the machine can function without a court reporter and even without a technician of any sort. Those who have had experience in recording and transcribing of court proceedings believe that if a verbatim record is desired the hope will be dashed, but the effort will be to make the record simply by stringing a few wires to a mechanical marvel.

The salesmen will not lack for encouragement from high places. Eisenhower, the General, and now Eisenhower, the President, commands respectful attention when, in his *Crusade in Europe* he tells this tale about his wartime work in Washington, early in 1942:

> To insure that none would be forgotten and that records for subordinates would always be available [General Eisenhower wrote], we had resorted to an automatic recording system that proved most effective. The method was a complete wiring of my war room with dictaphones so placed as to pick up every word[4] uttered in the room. Conversations were thus recorded on a machine just outside my office where a secretary instantly transcribed them into notes and memoranda for the benefit of my associates in the Operations Division. As a consequence, and often without further reference to me, the staff was able to translate every decision and agreement into appropriate action and to preserve such records as were necessary. I made it a habit to inform visitors of the system that we used so that each would understand its purpose was merely to facilitate the execution of business. It saved me hours of work in the dictation of notes and directives and relieved my mind of the necessity of remembering every detail of fact and opinion that was presented to me.

Had this glowing testimony from a national hero been available to the salesmen in 1942, rather than years later when the book appeared, the salesmen might have made a killing on the basis of what seemed to be convincing and unimpeachable authority. But time did not bring forth the revolution that then seemed imminent, and successful selling at that time could well have backfired, because ten years later another national authority indicated that the sound-recording millennium had not yet arrived. The Judicial Conference of the United States in its report of September, 1952, said this, concerning the possible application of sound recording to federal court proceedings:

> Chief Judge Laws, chairman of the Committee on Sound Recording in the District Courts, reported on a test of sound recording made in the District Court for the District of Columbia in the last year. He said that the impression produced upon the committee and personnel of the court who were present was favorable, but that experimentation for further improvements in equipment and technique was going on and that it was expected that progress would be made within the coming year. The Conference authorized the committee to continue its study.

In West Virginia, too, the salesman has been successful, and his efforts were reflected thus in the *Christian Science Monitor* of October 10, 1951:

> West Virginia has not merely a stenographic record but a complete tape recording of the deliberations of its House of Delegates, the lower house of the state Legislature.
>
> This is the outgrowth of a system that began with the placing of a microphone on each lawmaker's desk for a public address system. A natural next step was tape recording.
>
> Among the resultant advantages, William E. Flannery, speaker of the house, reports a great saving in salaries of expert stenographers, economy of filing space for the recordings, and the

2. If use is not prohibited by cost or circumstance, any useful tool should be used, and logic indicates that the robot can be useful indeed. The spoken word makes only one flight to oblivion. It offers only the split second for comprehension and capture. But if that word does not elude the robot it can be repeated forever.

3. But should the judge be able to deafen the ear of the Reporterobot?

4. I believe we may safely challenge this assumption of a *verbatim* record.

possibility of playing back any passage for printing in the journal or to establish exactly what was said and even with what inflection.[5]

My correspondent has a fellow-thinker in New York City, whose conviction was the subject of an article in the *Herald-Tribune* of June 1, 1951, from which this quotation is taken:

> Established systems of shorthand for reporting political conventions, corporate meetings, ecclesiastical and scientific conclaves, judicial and quasi-judicial proceedings will eventually be replaced by magnetic recording.
>
> That prediction was made yesterday by Murray Sanders, . . . former teacher of shorthand in New York City schools and a reporter in many noted cases and legislative investigations for the last twenty-five years.

According to that article, Mr. Sanders is offering a recording service, and "he is certain that widespread application inevitably will come about in courts, in lecture halls, in institutions of learning, in the field of entertainment, in scientific sessions, in political gatherings and in every conceivable realm of public and private discussion".

One more instance will suffice to demonstrate that the sound recording salesman needs no encouragement and that no crusade is necessary to dramatize the fact that the sound recorder is here. This item appeared in the *New York Times* of October 8, 1952:

> A tape recorder fed by thirteen strategically placed microphones will help preserve for posterity the future utterances of members of the Board of Estimate and persons appearing before that body. It was hinted yesterday by a spokesman for the board that the new recording system might be used for the first time when the board holds a regular meeting next Thursday.
>
> The new recording system, which will supplement and perhaps later replace the present method of recording the board's proceedings with the aid of stenographers using stenotype machines, is being installed at a cost of $3,639 under a contract let last month . . . .
>
> Resort to the tape recorder device was made necessary, it was explained, because of increasing difficulty in obtaining the services of qualified high speed operators of the stenotype machines now in use.[6]

Certainly, difficulty in obtaining qualified court reporters has stimulated search for a substitute. With traditional thoroughness the United States Navy has tested the sound recorder to determine whether the machine can be a substitute, and it is interesting to consider some excerpts from the report of those tests, made by Commander H. S. Cofield, U.S.N., in *The JAG Journal* (the publication of the Office of the Judge Advocate General of the Navy) for July, 1952:

> One of the perennial problems in the administration of Naval Justice is the obtaining of qualified court reporters . . . . Not all types of sound recording devices are equally well-adapted to mechanical court reporting. Previous experience has already demonstrated that wire and tape recorders are not adequate substitutes for a qualified court reporter. . . .
>
> [Machines[7] were loaned to the school by representatives of three companies, who also contributed their time and technical advice for the experiments.] One of the principal limitations on any mechanical reporting system is that the dictating machine will record clearly only one spoken voice at a time. In order to insure a clear record, that can be easily transcribed, only one person must be speaking at a given moment. In the "open mike" reporting system which records the actual voices of the participants, the circumstance of two people talking at the same time will occur. For example, when counsel interrupts a question or answer with an objection, an incident bound to occur in the course of a trial, the reporter must signal the President that the machine is unable to record two voices. The President (or Law Officer in a general court-martial) must then have the question repeated, followed by the objection, then the ruling, and the answer, if any, in an orderly sequence.[8]
>
> In conclusion, it does not appear that the "open mike" recording system is completely satisfactory, or a substitute for a well trained and experienced court reporter. . . .

Place of Sound Recorder Will Be Determined by Test

And so the debate continues over the proposition that the writer of shorthand, by hand or by machine, is dispensable because shorthand is

Hurd Studio

Everett G. Rodebaugh has been engaged in court reporting since 1926. A graduate in economics from the Pennsylvania Wharton School, he has had three terms as chairman of the Conference of United States Court Reporters.

old-fashioned and now there is something better. Of course, if shorthand reporting has or ever should become obsolete it will make no difference what anybody thinks about it. The place of the sound recorder will be determined by trial and test, and ultimately will depend on what the robot can do within a reasonable limit of cost. Salesmanship may help in finding that place, but the salesman—that artist in putting gold upon the lily—eager for sales and carried away by his own enthusiasm, may also hinder. For many years the salesmen have announced that the new day is here, the new day of electrical or mechanical recording of speech. But if earlier enthusiasms had prevailed, if the robots of earlier days had been made and had been trusted, much grief would have been

5. But perhaps it is more than coincidence that in the nearby State of Tennessee there was employed for a while a court reporter in a United States District Court, a reporter who staked everything on the sound recorder, because he wrote no shorthand. He is no longer so employed; a shorthand reporter has taken his place.

6. The need is plain: for more and better court reporters. And the moral is plain: a poor reporter will be displaced.

7. Including the machine of the Puerto Rico experiment.

8. To the harried court reporter this describes heaven!

the result and great optimism would have faded, because those robots would not have tarried long before they reached the junk pile.

Again and again the sound recorder has been oversold, but it is nothing new for hope and expectation to exceed realization. An excerpt from *The Phonographic World* for February, 1888, reads: "The Scientific American for December 31st contains an elaborately illustrated article on Edison's Phonograph, the writer of which (apparently) has been completely converted . . . to the idea that this machine is going to take the place of all shorthand dictation and reporting. . . ." That result has been a long time in the coming and the evidence still indicates a negative: that that time is not yet here.

The evidence also indicates a positive: that under ideal conditions, under controlled or even contrived conditions, under favorable conditions, and *perhaps* even under difficult conditions, the sound recorder can make a good recording.[9] But the evidence does not indicate that the competent court reporter can now be dispensed with or that the sound recorder can ever be left to its own devices, without the attendance of a trained operator. Sooner or later sound recording will find its proper place and that will be in response to the demand which it may create. Whatever be the demand, everyone concerned will have to adjust to it.

Intelligent Skepticism Is Required

I suggest that the court reporter, the lawyer, the judge, that everyone concerned should be an intelligent skeptic, willing to be shown, but secure in the knowing that the salesman will turn every stone for the showing, and sure that the robot will find use as it may demonstrate usefulness.

But, to return to the argument, let us consider what is truth. The impact of the sound recorder is sharp because everyone knows that human achievement is limited by human capability, and everyone knows that man as a court reporter certainly is as human and as fallible as man in any other undertaking. Let us assume, for our argument, the postulate that we are imperfect and that a machine can be perfect, and let us see whether that assumption will stand up. I think it will not, and in this I believe my friend will find agreement, because the machine as a perfect court reporter must have intelligence, and no machine can be intelligent. The machine can be only a robot. In this case I will grant that it can be a very clever robot. But the machine cannot do without attention and without understanding and without intelligence. And even then sometimes the recorder will disappoint. This is what counsel said about that on October 20, 1952, in the United States District Court at Philadelphia, in referring to a transcript from another court of a proceeding in which the reporter had employed a sound recorder:

> I ordered and received a copy of that transcript. Unfortunately we had an old lady who was sick, and so forth, and her report wasn't complete. Even the ruling of the judge on the motion to dismiss is not there.
>
> So she tried to check it with the machine and the machine is also inaudible, mixed up, the little recording machine.[10]

Sometimes the robot will disappoint even when the robot is led by the hand. My reporting office in Philadelphia was called on recently to provide rush transcript of the proceedings, except for those which were to be in the form of prepared papers, during a three-day convention. For certainty that nothing would be lost it was arranged that a sound recorder would make a record of everything that was said, including the addresses of those who did read from prepared papers. For certainty that the sound recorder would not fail, a tape recorder was used which was owned by the association and which was attended by the man who was accustomed to its operation. And for certainty that the customary attendant should not fail, it was arranged that a sound engineer should be employed to watch over the magic. The denouement was sad. It was unnecessary to use the sound recording except in the case of one speaker who was to read his paper, but who confessed afterwards that he had spoken without reading. Then the sound record was put into the breach, but because there was difficulty the president of the association called upon me to see if our organization could make first a shorthand record from the sound record and then supply a typescript. We tried. And we succeeded in part, but only to the extent that the failure of the sound recorder—despite all the precautions—could be cured. With the perversity of luck, one of the experts had forgotten at that point about one of the gadgets on the robot. There was just enough record on that reel of tape for it to yield, with the application of the intelligence and the skill of the court reporter, a partial but a usable transcript. The resuscitation was performed by a stenotype reporter, who made three separate records of what he could understand from the sound recording and then prepared, by culling from the three stenotype tapes laid out before him, the best transcript that could be made. The spoken word sometimes seems to be as elusive as quicksilver—or as elusive as truth!

I suggest that it is just because the robot cannot be made human, can-

9. That which is not obvious should be noted at this point: A good recording does not insure a good transcript. Words are only building blocks. They must be spelled and punctuated and paragraphed and ordered into a grammatical structure. And every collection of words must be identified with a speaker, and often awarded between competing speakers—a task which may cause the robot to scratch its head in perplexity.

10. We can only speculate about the reasons for this failure. Perhaps the machine was inadequate. Perhaps the machine was improperly operated or used, so that it could not perform. Perhaps the judge did not enforce order in the courtroom or insist that only one speak at a time. Perhaps the speakers could not be identified on the recording. Perhaps there was electrical or mechanical failure; a tube may have burned out. Perhaps there was too much shuffling of papers or scraping of feet. Perhaps a virus was endemic; Stokowski has been known to interrupt an orchestral concert because coughing in the audience intruded upon the music as it was scored by the composer, but a judge is not likely to be a perfectionist in acoustics, nor can he undo damage that has been done. Words that are lost cannot be reclaimed.

not be made intelligent, that inevitably the robot will disappoint, that the robot cannot safely be entrusted with the sole responsibility for making the verbatim record. If the robot could now perform that miracle would the qualified[11] court reporter be sought after, as he is today? I think not. Because his skill would be outmoded by what is called technological progress.

Granted, the court reporter has the limitation of being human. He has also the genius of human ability. He has intelligence and he can apply that intelligence to his problems. He will know when something goes amiss, when proceedings may be unintelligible, when things may get out of hand; he *knows* when something goes wrong, he *knows* if any word is lost. The qualified court reporter will protect the record, and that ability cannot be given to the machine, and that the machine can never learn.

So I shall have to be shown, and I am not convinced that litigants and lawyers and judges and commissions and lawmakers will prefer the gadget, the robot, to the services of the competent, well-trained and intelligent court reporter, the reporter who quite well may decide that the sound recorder can be his handmaiden, but the court reporter who will apply his understanding and his intelligence and his experience and his skill to give what is needed: the accurate and workmanlike transcript of the spoken word.

11. The adjective is all important. Only a reporter qualified by intelligence and aptitude and training can perform the near miracle of capturing the blizzard of words that is let loose every day in the courtroom, and transforming those words into a coherent typescript. In many places an optimistic or opportunistic stenographer is allowed to qualify as a court reporter, without examination, simply by hanging out a shingle. Even where competence is tested by examination, the number of qualified reporters may be inadequate. Obviously, if qualified reporters cannot meet the demand for reporting services, a substitute (e.g., the robot) will be sought.

Supply responds to effective demand. Too often the demand for qualified court reporters is not coupled with provision for adequate compensation. For many court reporters the sweatshop has not been abolished.

A New Camera Stand for Document Examiners

■ The document expert should face squarely his obligation to the legal profession and render the kind of service that will promote justice through scientific photography. This cannot be done if the object board of the camera can be moved in only one direction and that independently of rear controls. It is just as necessary to operate the object board from the rear of the camera as it is to focus by a rear control while watching the ground glass. Those who have viewed an erasure on a paper know that at some particular angle it can be seen clearly, but when turned away from this angle, the evidence of the erasure may be lost. The advantage of photographing an erasure at a favorable angle also applies in many instances to the sequence of two ink strokes, lead pencil and typewritten strokes, and ink and lead pencil strokes. Scientific photography requires scientific equipment and scientific operation. Just as electric tools have made some hand tools obsolete so the camera illustrated makes the camera with a fixed, immovable stand and object board obsolete.

Figures 1 and 2 illustrate the design of a camera stand[1] that will enable a questioned document examiner to use his camera in horizontal or vertical position, or in any other position between horizontal and vertical. While these adjustments are often essential in combination with special lighting, a very important feature of this camera stand is the adjustable metal frame in front of the lens. This metal frame is constructed to accommodate as many different kinds of object boards as the expert may find useful. More important still is the fact that the various object boards, which are instantly removable, are controlled and

(Continued on page 305)

1. This camera stand also was installed in the Allegheny County Crime Laboratory by Joseph D. Nicol who was recently in charge of this laboratory, but who now is with the Criminal Bureau of Investigation at Miami, Florida.

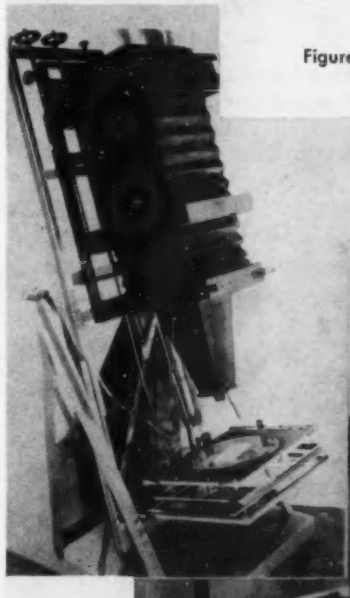


Figure 1

CAMERA STAND DESIGNED
— By —
Edwin H. Fearon
PITTSBURGH, PENNSYLVANIA
For Special Questioned Document Examinations

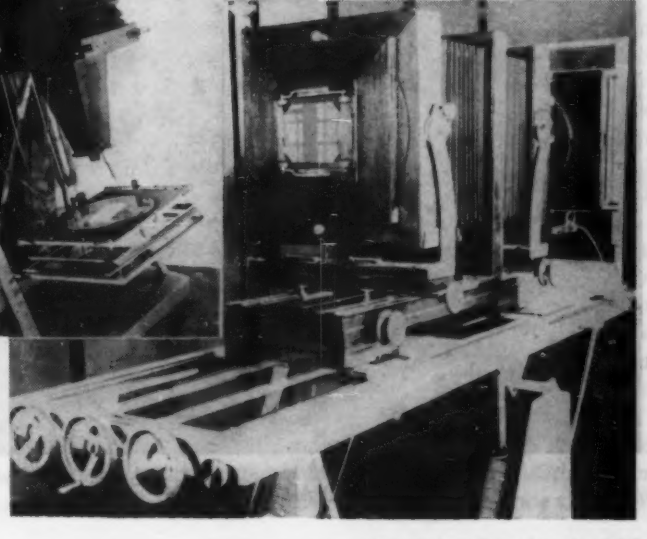


Figure 2

State Delegates Nominate New President Members of Board of Governors

■ William J. Jameson, of Billings, Montana, was nominated by the State Delegates for the office of President of the American Bar Association at the Mid-Year Meeting of the House of Delegates on February 24 at Chicago, Illinois.

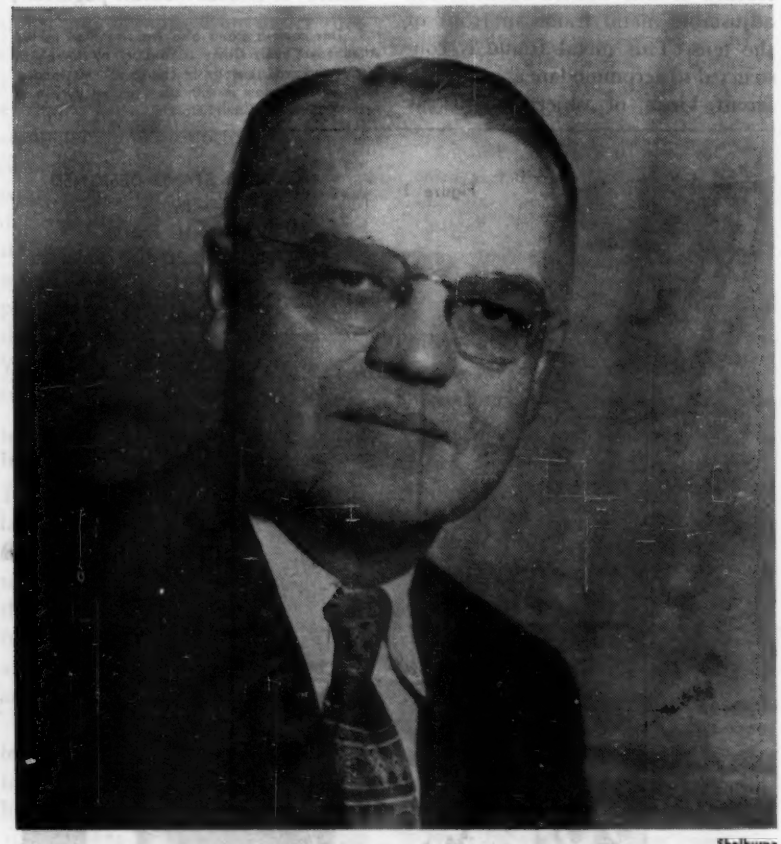
Mr. Jameson is a native Montanan, born August 8, 1898, at Butte. He received his college and professional education at Montana State University, receiving the degrees of A.B. in 1919 and LL.B in 1922. The University awarded him the honorary degree of LL.D in 1952.

Mr. Jameson began the practice of law in Billings, Montana, in 1922 as an associate of the firm of Johnston, Coleman and Johnston. He became a member of the firm in 1929, which is now the firm of Coleman, Jameson and Lamey.

Mr. Jameson has been a member of the American Bar Association since 1926 and has been active in the work of the Association, as well as in his local and state associations. He was Secretary of the Montana Bar Association from 1924 to 1929 and President of that Association in 1936-1937.

He has been a member of the House of Delegates ever since the Association was reorganized in 1936, and has never missed a meeting. He represented the Montana Bar Association in the House of Delegates from 1936 to 1938, was State Delegate from 1938 to 1943, a member of the Board of Governors from 1943 to 1946, and since 1946 has been an Assembly Delegate. He has served on many committees, including Printing and Printing Costs (1944-1947); Public Relations, (1944-1945); Publications (1946-1948); Rules and Calendar (1947-1948); Scope and Correlation of Work (1947-1952). He is now a member of the Committee on Regional Meetings and was Director of the meeting at Yellowstone National Park in June, 1952. He has been a member of the National Conference of Commissioners on Uniform State Laws since 1944.

Mr. Jameson has also been active in community and public service. He was a member of the Montana State Legislature from 1927 to 1930, served on the Board of School Trustees of Billings from 1930 to 1932, and has been active for many years in the American Red Cross, serving as Yellowstone County Chairman from 1931 to 1945. He was President of the Billings Commercial Club in 1947 and District Governor of Lions International for Montana and Alberta in 1941-1942. He is a member of the Board of Trustees of the Billings Y.M.C.A., Billings Deaconess Hospital, First Methodist Church of Bill-



Shelburne

WILLIAM J. JAMESON

Hank Cohen

ROBERT T. BARTON, JR.

Bodie

RICHARD P. TINKHAM

Chase Photo

HERBERT G. NILLES

ings, and Endowment Foundation of Montana State University. He served as President of the Montana University Alumni Association for several years. He is a member of Phi Delta Phi and the American Legion.

Along with his legal representation of business clients, he is a director of the Montana Power Company and Montana Coal and Iron Company.

Mr. Jameson married Mildred Lore of Billings, Montana, in 1923. They have two children, Mrs. Walker Honaker of Billings, Montana, and Lieutenant William J. Jameson, Jr., now stationed with the Air Force in Albuquerque, New Mexico. There are two grandchildren, Katherine Ann and Elizabeth Honaker.

In addition to the nominee for President, the State Delegates nominated three new members of the Board of Governors and renominated Joseph D. Stecher, of Ohio, and Harold H. Bredell, of Indiana, to succeed themselves as Secretary and Treasurer respectively.

Robert T. Barton, Jr., of Virginia, Richard P. Tinkham, of Indiana, and Herbert G. Nilles, of North Dakota, were nominated for three-year terms on the Board of Governors from the Fourth, Seventh and Eighth Circuits respectively.

Nomination by the State Delegates is tantamount to election.

Mr. Barton, nominated to represent the Fourth Circuit on the Board, was born in Winchester, Virginia, in 1891 and received his education at the Shenandoah Valley Academy and the University of Virginia, which awarded him the degrees of B.S. and LL.B. in 1914. He served as a lieutenant in the Infantry in the Mexican border campaign of 1916-1917 and as a captain in the Field Artillery in 1918-1919, participating in the battles of St. Mihiel and the Meuse-Argonne. In World War II, he saw eighteen months' service overseas with the Army Air Corps as a colonel.

Mr. Barton has taken an active part in Virginia politics, having been a member of the Virginia General Assembly in 1926 and on the staffs of three governors of Virginia. He has been a member of every Democratic State Convention since 1920 and he was a delegate to the Democratic National Convention in 1936.

Among his services to the work of the organized Bar, Mr. Barton has been a member from Virginia of the National Conference of Commissioners on Uniform State Laws since 1934, and chairman of its executive committee in 1942-1943, and he is a former vice president and chairman of the executive committee of the Virginia State Bar Association.

Richard P. Tinkham was born in Valparaiso, Indiana, on July 28, 1902. He was educated in the public schools in Hammond, graduated from Wabash College, A.B., in 1925; received his legal education at Harvard University, LL.B. in 1928. He was admitted to the Bar of Indiana in 1928. He was a member of the Indiana State Board of Law Examiners, 1942-1950. He was Chairman of the National Conference of Bar Association Presidents, 1951-1952. He is a member of the American Law Institute, the Hammond, Chicago, Indiana State and American bar associations. He was President of the Indiana State Bar Association in 1950-1951. Mr. Tinkham was a member of the House of Delegates of the American Bar Association, 1951-1952; has been a member of the Committee on Public Relations since 1950; member of the Committee on Regional Meetings, 1951-1952; member of the Rules and Calendar Committee, 1951-1952.

Herbert G. Nilles, nominee for membership on the Board of Governors for the Eighth Circuit, was born at Everest, North Dakota, in 1894, and received his LL.B. from the University of North Dakota in 1917. He served as a sergeant in the A.E.F. in 1918-1919.

He was president of the North Dakota State Bar Association in 1940-1941, and is a member of the International Association of Insurance Counsel, the Fargo Chamber of Commerce, and the North Dakota Bar Board. He has been a member of the Law Lists Committee of the American Bar Association and has been a State Delegate since 1947.

Diamond Jubilee Meeting (1878-1953)

First Announcement of Program

Boston, Massachusetts, August 23—28, 1953

EVENTS, SUNDAY, AUGUST 23

Afternoon 4:00 to 6:00 p.m. General Reception at the Harvard Club of Boston (Commonwealth Avenue at Massachusetts Avenue) in honor of President and Mrs. Storey. During the reception, the organ in Harvard Hall will be played by William W. Evans, of New Jersey, and Julius J. Wuerthner, of Montana. Refreshments will be served.

Evening 8:00 p.m. Concert by the Boston Symphony Orchestra at the Hatch Memorial Shell on the Charles River Esplanade (five blocks from the Statler Hotel).

On both occasions, members of the American Bar Association, the Conference of Chief Justices, and other related organizations will be the guests of the Massachusetts Bar Association and the Boston Bar Association.

Section Meetings (See program below.)

THE ASSEMBLY

FIRST SESSION

Monday, August 24, 10:00 a.m. Imperial Ballroom of the Hotel Statler

The President presiding

Call to order
Invocation, The Most Reverend Eric F. MacKenzie, Auxiliary Bishop of Boston
Address of Welcome, His Excellency Christian A. Herter, Governor of the Commonwealth of Massachusetts
Response, Albert E. Jenner, Jr. of Chicago, Illinois
Introduction of Distinguished Guests
Annual Address of the President
Presentation of Resolutions
Twelfth Annual Meeting of the American Bar Association Endowment, Carl B. Rix, President, Milwaukee, Wisconsin
Announcement of vacancies in offices of State and Assembly Delegates
Nomination of five Assembly Delegates for three-year terms
Nomination and Election of Assembly Delegates to fill vacancies

SECOND SESSION

Wednesday, August 26, 2:00 p.m. John Hancock Auditorium

The President presiding

Invocation
Speakers: Honorable André Taschereau, President of The Canadian Bar Association
(Additional speakers to be announced)

THIRD SESSION

Thursday, August 27, 2:00 p.m. John Hancock Auditorium

The President presiding

Invocation, Rabbi Joseph S. Shubow, President, Rabbinical Association of Greater Boston
Presentation of Ross Bequest Award
Address by Honorable Herbert Brownell, Jr., The Attorney General of the United States
Consideration of Amendments to Constitution and By-Laws
Report of Committee on Resolutions, Roy E. Willy, Chairman, Sioux Falls, South Dakota
Presentation of Awards of Merit to Bar Associations
Presentation of Awards of Merit to cities showing greatest improvement in Traffic Courts

FOURTH SESSION

Thursday, August 27, 7:30 p.m. Imperial Ballroom of the Hotel Statler

ANNUAL DINNER

The President presiding

Invocation, Dr. Frederick M. Eliot, President of the American Unitarian Association
Presentation of American Bar Association Medal
Introduction of The Lord High Chancellor of England by The Chief Justice of the United States
Address by The Right Honorable Lord Simonds, The Lord High Chancellor of England
Introduction of the Incoming President

FIFTH SESSION

Friday, August 28, Georgian Room of Hotel Statler, immediately following adjournment of the final session of the House of Delegates

Report by the Chairman of the House of Delegates of action upon resolutions previously adopted by the Assembly

Action by the Assembly upon any resolutions previously adopted by the Assembly but disapproved or modified by the House

Unfinished business

New business

Introduction of new officers and members of Board of Governors

Adjournment *sine die*

THE HOUSE OF DELEGATES

The House of Delegates will meet in the Georgian Room of the Hotel Statler at 2:00 P.M., Monday, August 24; 9:30 A.M., Tuesday, August 25; 9.30 A.M., Wednesday, August 26; 9:30 A.M., Thursday, August 27 and 9:30 A.M., Friday, August 28. The calendar for the House meetings will appear in the Advance Program.

SECTION MEETINGS AT BOSTON

(Completed programs will appear in the Advance Program for the Boston Meeting)

Administrative Law (Monday and Tuesday, August 24 and 25)

Hotel Kenmore. The Council will meet at 2:00 P.M., Monday, and the general sessions of the Section will be held Tuesday morning and afternoon. A luncheon will be held Tuesday noon.

Antitrust Law (Wednesday and Thursday, August 26 and 27)

The Section will meet at 10:00 A.M., Wednesday and Thursday, at the Touraine Hotel. A luncheon will be held at 12:30 P.M., Thursday, at the Parker House.

Bar Activities (Sunday and Tuesday, August 23 and 25)

The Council will hold a breakfast meeting at 8:30 A.M., and the Committee on Award of Merit will meet at 10:00 A.M. Sunday, at the Hotel Statler. The Conference of Bar Association Secretaries will meet at 9:30 A.M., Tuesday, followed by a luncheon at 12:30 P.M., at The University Club of Boston. The Section will hold a general session at 2:00 P.M., Tuesday, at The University Club of Boston.

Corporation, Banking and Business Law (Sunday, Monday, Tuesday and Wednesday, August 23, 24, 25 and 26)

The Council will meet at 10:00 A.M. and 2:30 P.M. on Sunday. The general sessions of the Section will be held at 2:30 P.M., Monday, and 10:00 A.M. and 2:30 P.M. on Tuesday, at The Somerset Hotel. The Division of Food, Drug and Cosmetic Law will meet on Tuesday and Wednesday at 10:00 A.M., at the Harvard University Law School.

Criminal Law (Monday and Tuesday, August 24 and 25)

Harvard Club of Boston. Regular sessions of the Section will be held at 2:00 P.M. on Monday, and at 10:00 A.M. and 2:00 P.M. on Tuesday.

Insurance Law (Sunday, Monday, Tuesday and Wednesday, August 23, 24, 25 and 26)

Sheraton Plaza Hotel. The Officers, Members of Council and Committee Chairmen will meet at a luncheon at 12:00 M. Sunday. On Monday at 8:00 A.M. breakfast meetings have been scheduled for the Committee on Automobile Insurance Law; Committee on Fire Insurance Law; and the Committee on Life Insurance Law and Compulsory Non-Occupational Disability Benefits, and Health and Accident Insurance Law. A luncheon will be held at 12:00 M. Monday, followed by a regular session at 1:30 P.M. On Tuesday at 8:00 A.M. the Committee on Casualty Insurance Law and Workmen's Compensation and Employers' Liability Insurance Law; and the Committee on Fidelity and Surety Insurance Law will hold breakfast meetings. Regular sessions will be held at 9:30 A.M. and 1:30 P.M. on Tuesday. A reception and dinner dance have been scheduled for Tuesday evening. Arrangements are being made for a panel on Trial Tactics to be held Wednesday morning.

International and Comparative Law (Sunday, Tuesday and Wednesday, August 23, 25 and 26)

The Council will meet at 10:00 A.M. and 2:00 P.M., Sunday, at the Hotel Statler. A breakfast meeting will be held Tuesday morning at 8:00 A.M., at The University Club of Boston, for the Comparative Law Division. Regular sessions of the Section will be held at 10:00 A.M. and 2:00 P.M., Tuesday, and 10:00 A.M., Wednesday, at the Hotel Statler. A joint luncheon with the Junior Bar Conference is scheduled for 12:30 P.M., Tuesday at Hotel Statler.

Judicial Administration (Sunday, Monday, Tuesday, Wednesday and Thursday, August 23, 24, 25, 26 and 27)

The Council will meet at 10:00 A.M., Sunday at the Hotel Statler. At 12:30 P.M. on Monday there will be a luncheon for the Judges attending the meeting, followed by an afternoon program at the Harvard Club of Boston. The Annual Dinner in honor of the Judiciary of the United States, will be held at 7:30 P.M., Monday, at the Hotel Statler. A regular session of the Section will be held at 10:00 A.M. on Tuesday, and at 2:00 P.M. there will be a joint meeting with the Traffic Court Program. Regular sessions of the Section will be held at 10:00 A.M. on Wednesday, and 10:00 A.M. on Thursday, at the Suffolk County Court House.

Junior Bar Conference (Saturday, Sunday, Monday and Tuesday, August 22, 23, 24 and 25)

Bradford Hotel. The Executive Council will meet at 9:30 A.M. and 2:00 P.M., Saturday. On Sunday there will be a meeting with State Junior Bar Groups at 9:30 A.M. A luncheon at 12:30 P.M. will be followed by a general session of the Conference at 2:00 P.M. On Monday at 2:00 P.M. there will be meetings of the Resolutions Committee and Nominating Committee.

A round table discussion will be held at 2:30 P.M., and at 4:00 P.M. a debate and reception sponsored by the Conference on Personal Finance Law. On Tuesday there will be a regular session of the Conference at 10:00 A.M., which will be followed by balloting for officers and council members. At 12:30 P.M. a joint luncheon with the Section of International and Comparative Law will be held at the Statler Hotel. Tuesday evening there will be a dance at The Somerset Hotel.

Labor Relations Law (Sunday, Monday and Tuesday, August 23, 24 and 25)

Touraine Hotel. The Council will meet at 10:00 A.M. and 2:00 P.M. on Sunday. The regular sessions of the Section will be held at 2:00 P.M., Monday, and 10:00 A.M. and 2:00 P.M., Tuesday. A luncheon is scheduled for 12:30 P.M., Tuesday.

Legal Education and Admissions to the Bar and joint sessions with National Conference of Bar Examiners (Saturday, Sunday, Monday and Tuesday, August 22, 23, 24 and 25)

Hotel Statler. The Section Council will meet at 2:00 P.M. on Saturday and 10:00 A.M. and 2:00 P.M. on Sunday. The Section will hold joint meetings with the National Conference of Bar Examiners at 2:00 P.M. Monday, and 10:00 A.M., Tuesday. A joint luncheon will be held at 12:30 P.M., Tuesday. A regular meeting of the Section is scheduled for Tuesday afternoon at 2:00 P.M.

Mineral Law (Monday, Tuesday and Wednesday, August 24, 25 and 26)

The Somerset Hotel. The Council and Committee Chairmen will meet at 4:00 P.M., Monday. The regular sessions of the Section will be held at 10:00 A.M. and 2:00 P.M., Tuesday, and 10:00 A.M., Wednesday. A dinner is scheduled for Tuesday evening.

Municipal Law (Sunday, Monday and Tuesday, August 23, 24 and 25)

Sheraton Plaza Hotel. The Council will meet at 10:00 A.M. on Sunday. The regular sessions of the Section will be held at 2:00 P.M. Sunday, 2:00 P.M., Monday, and 9:00 A.M. and 2:00 P.M., Tuesday. A luncheon will be held at 12:30 P.M. Tuesday.

Patent, Trade-Mark and Copyright Law (Friday, Saturday, Sunday, Monday, Tuesday and Wednesday, August 21, 22, 23, 24, 25 and 26)

The Council and Committee Chairmen will meet at 7:00 P.M. on Friday. Arrangements are being made to hold symposiums on Saturday morning and afternoon and Sunday morning. The American Group of the International Association for the Protection of Industrial Property will meet at 2:00 P.M. Sunday. A breakfast has been scheduled for the National Council of Patent Law Associations at 8:00 A.M. Monday. The above meetings will be held at the Parker House. The regular sessions of the Section will be held at 2:00 P.M. Monday, 10:00 A.M. and 2:00 P.M. Tuesday, and 10:00 A.M. Wednesday, at the Tremont Temple. A luncheon has been scheduled at 12:30 P.M., Tuesday, for the American Group of the International Association for the Protection of Industrial Property, and the Section dinner for Tuesday evening, both of which will be held at the Parker House.

Public Utility Law (Sunday, Monday, Tuesday and Wednesday, August 23, 24, 25 and 26)

Sheraton Plaza Hotel. The Council will meet at 2:00 P.M. and the Advisory Committee at 3:30 P.M., Sunday. The regular sessions of the Section will be held at 2:00 P.M., Monday, and at 10:00 A.M. and 2:00 P.M. on Tuesday. There will be a Council luncheon at 12:30 P.M. on Tuesday. A dinner dance will be held on Wednesday evening.

Real Property, Probate and Trust Law (Monday, Tuesday and Wednesday, August 24, 25 and 26)

The Somerset Hotel. A luncheon meeting for Council members will be held Monday at 11:00 A.M. The Division Meetings of the Section will be held at 2:00 P.M., Monday, 9:30 A.M., Tuesday, and 9:30 A.M., Wednesday. There will be a breakfast meeting for the Officers, Council and members of Section Committees on Tuesday at 8:00 A.M. A dinner has been scheduled for Tuesday evening. The place will be announced later. A meeting of the Council members will be held at 2:00 P.M., Wednesday.

Taxation (Thursday, Friday, Saturday, Sunday, Monday, Tuesday and Wednesday, August 20, 21, 22, 23, 24, 25 and 26)

Sheraton Plaza Hotel. The Officers and Council will meet in executive session at 10:00 A.M. and 2:00 P.M., Thursday, with a luncheon at 12:30 P.M. On Friday at 9:30 A.M. and 2:00 P.M. there will be a meeting of the Council and Committee Chairmen, with a luncheon at 12:30 P.M. Regular sessions will be held at 10:00 A.M. and 2:00 P.M., Saturday, and 10:00 A.M. and 2:00 P.M., Sunday. The Section luncheons are scheduled for Saturday and Sunday, at 1:00 P.M. On Monday at 2:00 P.M. there will be a regular session and at 6:00 P.M. there will be a reception followed by a dinner dance. Regular sessions will be held at 10:00 A.M. and 2:00 P.M. Tuesday, which will be devoted to a panel discussion. The special session on State and Local Tax Problems will be held at 9:30 A.M., Wednesday.

International Extradition: The Holohan Murder Case

by Samuel Miles Fink and Ralph J. Schwarz, Jr.

■ Readers of the *Journal* will probably recall the newspaper accounts of the discovery in Italy of the body of an American O.S.S. officer who was allegedly murdered by his companions while on a war-time mission behind the German lines in Italy. Messrs. Fink and Schwarz are members of the New York law firm which represented the Italian Government in its attempt to extradite Major Holohan's companions to Italy to stand trial for murder. Their article deals with the legal problems of the case and the peculiar nature of the international extradition process.

■ In August, 1951, the newspapers of this country released a cloak-and-dagger story of a mysterious wartime slaying with "facts so gruesome as to be almost unbelievable were they not supported by . . . written and oral confessions and the testimony of numerous other individuals".[1]

In September, 1944, Major William V. Holohan had parachuted, together with two other Americans, Lieutenant Aldo Icardi and Sergeant Carl Lo Dolce, into Northern Italy behind enemy lines as part of a wartime secret O.S.S. mission.

It will be recalled that in September, 1943, Italy had signed an armistice with the United States and other allies, and in October, 1943, Italy had declared war on Germany and had become a cobelligerent. Nonetheless, large territories of Northern Italy remained under the dominion and control of the German army. The principal purpose of the mission was to make contact with Italian partisan forces operating behind German lines, and to direct dropping of American arms by parachute to these Italian partisans.

The three Americans, joined by two Italian partisans, did make contact with the Italian partisan forces of Northern Italy. In the course of their operations, on December 6, 1944, Major Holohan disappeared. There was no dispute about the date of his disappearance nor was there any trace of his whereabouts or his body. The report initially made was that the Major had been the victim of a German ambush. The mission continued and effected the dropping of some fifty arms drops, enough to arm, it is reported, 30,000 to 40,000 men.

Several years later confessions by the two Italian partisans revealed quite a different story. There had been no German ambush. The Major had been poisoned, shot twice in the head by Sergeant Lo Dolce, and the Major's body, wrapped in a military sack, had been dropped into Lake Orta. The Major's body was recovered from Lake Orta, almost perfectly preserved. The homicide weapon was found. An autopsy, a ballistics test and the written confession of Carl Lo Dolce corroborated in every detail the testimony of the Italian partisans.

Despite the seriousness of the alleged crime, no American court had jurisdiction to try the case. Under the Articles of War then applicable, no court martial had jurisdiction over former servicemen subsequent to their discharge from the Armed Services.[2] Likewise, since American criminal law is basically territorial, no criminal court of the United States had jurisdiction insofar as the crime charged had not been committed in the territory of the United States.[3]

If there was to be a trial on the charge of murder, there was but one possible competent tribunal, a court of the Republic of Italy. This would necessitate an extradition to that country. Members of the Bar will appreciate, we are sure, the numerous problems of the procedural mechanism of an international extradition, in addition to

1. The quoted portions are taken from the opinion of Chief District Judge John Knight, in the *Matter of the Application for the Extradition of Carl George Lo Dolce*, 106 F. Supp. 455 U.S.D.C. W.D.N.Y. August 11, 1952.

The newspaper release was evidently prompted by publication of the entire story in the September, 1951, issue of *True* magazine. This extradition proceeding by the Italian government arose out of the alleged murder of Major William V. Holohan. The facts, which appear in greater detail in the article, are those adduced in the proceeding. Any conclusions of law are of course strictly the legal opinions of the authors who were members of the firm which handled the extradition proceeding on behalf of the Italian government.

2. *United States* v. *Matanaphy*, 168 F. 2d 503, 505 (2 Cir. 1948), 336 U.S. 210 (1948).

3. *United States* v. *Bowman*, 260 U.S. 94, 98 (1922).

the basic question of the right of the Italian government to demand extradition under the treaty.

It is the principal purpose of this article to review, as concisely as possible, the procedure which is followed in an international extradition proceeding, touching at the same time upon the policy conflict and jurisdictional questions involved in this rather out-of-the-ordinary case.

The Historical Background of International Extradition

Extradition found its genesis in the growth of separate sovereign states and the concomitant problem of the punishment of crime by particular sovereigns. Quite obviously, the maintenance of peace and order and the stability of social and economic relationships by a sovereign state would require the means by which such a state could punish its fugitives from justice. The recognition of this need found expression by no less an authority than Grotius in the early 1600's.[4] He expressed the view that respective governments were under a duty either to punish fugitives from justice, or to deliver them to the government from which they had fled. This statement of international law, however, did not coincide with the historical facts. The individual entity and independence of separate states and the absence of a need for co-operative undertaking was such that an asylum was generally granted to fugitives. A sovereign community could enforce the return of fugitives from justice only by force of arms. As the self-interest of growing communities in stability increased, return of fugitives from justice to neighboring states was at times accomplished. If for no other reason than that the mode of transportation did not afford a ready means of escape farther than the neighboring community, this practice extended no further.[5]

The historical facts were reflected in the judicial rule to the effect that no state has an absolute right to demand that another state return a fugitive from justice, though it has "what is called an imperfect right, a right to ask it as a matter of courtesy, goodwill and mutual convenience".[6] In the United States, under such a judicial rule, the general practice was neither to ask for extradition nor to permit it. Lacking judicial extension of the right to extradition, the inexorable trend toward the interdependency of communities necessitated extradition treaties. Today, the subject of extradition is regulated by treaty, and in the United States, at any rate, it is well settled that there can be no international extradition apart from a treaty.[7]

But even in the interpretation of the treaties themselves, the conflicting interest of the independent sovereign and sovereign immunity and the demand for just punishment assert themselves. Without regard to the validity of either of these concepts in an increasingly integrated universe, and despite their amorphous application, they nonetheless describe the underlying basis of the Holohan extradition case.

Definition and Description of Extradition Procedure

An international extradition is "the surrender by one nation to another of an individual accused or convicted of an offense outside of its own territory, and within the territorial jurisdiction of the other, which, being competent to try and punish him, demands the surrender".[8] More simply stated, it is the process by which a foreign government secures the return of a person convicted of a crime or the return of a person accused of a crime to stand trial by the demanding government. The principal questions arise in connection with the demand by a foreign government for the return of a person accused of a crime. As stated above, as far as the United States is concerned, today the authority for international extradition is to be found only in congressional statute and treaties with particular countries.[9]

All extradition treaties provide in effect that both governments agree to deliver up persons who are charged with having committed one of the crimes enumerated in the treaty within the jurisdiction of the demanding government. Very briefly, for the sake of clarity the procedure in the United States for the enforcement of the treaty rights is as follows:

There is a demand by the foreign government, the issuance of a certificate by the Secretary of State, the swearing out of a complaint under oath for the arrest of the accused, followed by the holding of a hearing to determine whether there is jurisdictional basis and sufficient evidence to justify sending the accused back to the demanding government to stand trial.

Steps To Be Taken To Institute Proceedings

The first step in an international extradition is the forwarding of a formal requisition by the foreign ministry of the foreign government to the Secretary of State. The Secretary of State thereupon issues his certificate, authorizing the institution of the extradition proceeding before any United States judge or commissioner or state judge of a state court of general jurisdiction. It should be kept in mind that these two steps involve only the executive branch of the Government, and are taken before any judicial proceedings are instituted.

After the requisition and the issuance of a certificate by the Secretary of State, the foreign government is authorized to institute judicial proceedings for the extradition. This proceeding is instituted by a complaint under oath which requests that a warrant of arrest issue for the accused.[10]

The immediate question presents

4. Grotius, *De Juri Belli et Pacis* Lib. II c. 21 §§ 2, 4 and 5.
5. Oppenheim, *International Law* (Fourth Edition, 1926) Volume I, page 565.
6. *Commonwealth v. Deacon*, 10 S. & R. 125, 131 (Pa., 1823).
7. *Factor v. Laubenheimer*, 290 U.S. 276, 287 (1933); *Valentine v. United States*, 299 U.S. 5, 9 (1936).
8. *Terlinden v. Ames*, 184 U.S. 270, 289 (1901).
9. 62 Stat. 822, 18 U.S.C. 3184.
10. The foreign government, by its representative, is a proper party to prosecute the extradition proceeding, or to defend any habeas corpus proceeding. *Ornelas v. Ruiz*, 161 U.S. 502 (1896); *Clough v. Strakosch*, 109 F. 2d 330 (9 Cir., 1940).

itself as to the proper court before which the complaint under oath and the application for the warrant of arrest is made. The statute[11] and the certificate of the Secretary of State authorize the application for the warrant of arrest before any justice or judge of the United States, any commissioner authorized to act by a court of the United States or any judge of a court of record of general jurisdiction of any state.

Though the statute authorizes the institution of the proceeding before a state judge, as a matter of practice judicial proceedings are usually instituted before a United States district judge or a United States commissioner. Before proceeding before a commissioner, however, care must be taken that the commissioner, as required by the statute, is authorized to act in extradition cases. The mere appointment of the commissioner is not sufficient basis for his authority. There must be an authorization specifically commissioning him to act in extradition cases.[12]

The next question is—in which United States District Court must the proceeding be instituted? Attorneys for the consular representatives of a foreign government will find this a question of extreme practical importance. The Lo Dolce extradition case illustrates precisely this point. The Secretary of State authorized the institution of judicial proceedings against Aldo Icardi, who resided in Pennsylvania, and against Carl Lo Dolce, who resided in Rochester, New York.

There is no question about one point. The proceeding must be instituted and the hearing held in a United States district court of the state where the accused resides. Thus simultaneous proceedings against Icardi and Lo Dolce would have required extradition proceedings in two separate states. But even if it were desirable to proceed only against Lo Dolce, a further question presented itself.[13] Was it necessary in the latter case to institute the proceedings in the United States District Court for the Western District of New York, embracing the district in which the accused resided, or could the proceedings be instituted in the United States District Court for the Southern District of New York, where the Consulate Office of the Consul General of Italy at New York is located? Quite obviously, preparation of the case and communications abroad are greatly facilitated where the attorneys proceed in the same district in which the Consul General's Office is located. In addition, there might be other cases in which the obtaining of a fair hearing and the avoidance of local prejudice would render it advisable to avoid the district in which the accused resides.

The rule seems to be, however, and undoubtedly the safest practice is to institute the proceedings and make the application for the warrant of arrest in the district in which the accused resides.[14] An argument may be made the other way.[15]

Within the district itself there is, however, greater latitude than the statute indicates.

The wording of the statute would seem to require that the judge or the commissioner who issues the warrant hold the hearing. The pertinent part of the statute reads:

> Any justice or judge of the United States or any commissioner . . . may upon a complaint under oath . . . issue his warrant . . . for the apprehension of the person so charged, that he may be brought before *such* justice, judge or commissioner. [Italics supplied].[16]

That, however, is not the case. It is now settled that a judge may make the warrant returnable before another judge, or a commissioner or vice versa.[17] Of course, this excep-

Samuel Miles Fink was admitted to the New York Bar in 1932, and is the senior member of his firm in New York City, which is counsel to the Italian Embassy at Washington and to the Consul General of Italy in New York.

Ralph J. Schwartz, Jr., was born in New Orleans and attended Tulane University from 1940 to 1943. He was graduated from Columbia Law School in 1948 and has practiced in New York City since his admission to the Bar in 1949.

11. 18 U.S.C. 3184.
12. *Grin* v. *Shine*, 187 U.S. 181, 186 (1902).
13. *Pettit* v. *Walshe*, 194 U.S. 205 (1904).
14. 194 U.S. 205, 219; *In re Mitchell*, 171 Fed. 289 (District Court S.D.N.Y. 1909); *Vaccaro* v. *Collier*, 38 F. 2d 862, 867 (Dist. Ct., Maryland, 1930).
15. In general criminal law procedure, the Federal Rules of Criminal Procedure (Rule 5A) require that the accused be brought upon a preliminary hearing before the "nearest" committing magistrate. As a matter of practice, no judge will make his warrant returnable for the preliminary hearing in any district other than that in which the accused resides or is found. However, the Federal Rules of Criminal Procedure are *not* applicable to extradition cases. Federal Rules of Criminal Procedure, Rule 54b. The only requirement under the treaties is that the evidence of criminality be determined by the *state* in which the accused is found. *Pettit* v. *Walshe*, 194 U.S. 205, 218 (1904). It would seem then, that every requirement of the treaty is met if the hearing is held at any district in the state in which the accused resides or is found.
16. 18 U.S.C. 3184.
17. 187 U.S. 181 at 188; *United States* v. *Casino*, 286 Fed. 976, 979 (District Court S.D.N.Y. 1923); *In re Keene* 6 Fed. Supp. 308, 311 (District Court So. Dist. Texas 1934).

tion is limited to making the warrant returnable before another judge or commissioner in the same federal judicial district.

Complaint Under Oath Requests Warrant of Arrest

Having determined the proper court, the next step is the making of the complaint under oath requesting that the warrant of arrest issue for the apprehension of the accused for a hearing and determination as to whether there is probable cause that the accused committed a crime under the treaty.

No judicial proceeding for extradition in United States courts may be instituted and no warrant will issue without a complaint under oath. The extradition statute is very clear on this point.[18] The question then presents itself as to the form of the complaint and its content.

The caption of the complaint follows those of any *ex parte* proceeding. In the first place, it should contain the name of the court to which the application for the warrant is made. The proceeding is entitled "In the Matter of the Application for Extradition of _____", naming the accused.

The complaint should be in affidavit form. It must be sworn to, however, by the complainant before the commissioner or judge issuing the warrant.

The complaint need not be drawn with the formality and precision of an indictment.[19] It should, however, contain generally, the following:

(1) The official position and capacity of the party making the complaint.

(2) The name of the accused.

(3) The allegation that the accused committed a crime (a) stating the date of its commission; and (b) the place where it was committed—the general area of the country is sufficient for this purpose.

(4) A short description of the crime so that it will clearly appear that the crime is one covered by the treaty.

(5) The sources of information.

(6) The fact that the certificate has been issued by the Secretary of State.

(7) The town or city in the United States where the accused is presently to be found. The complaint might properly end with a prayer for relief for the issuance of a warrant.[20]

It is now settled that the complaint may be made upon information and belief.[21]

It is also settled that any diplomatic officer or consul or vice consul may make the complaint. The only requirement is that the person making the complaint be duly authorized by the foreign government to act.[22]

Attorneys for foreign governments will of course want to know what documents, if any, must be annexed to the complaint or presented to the court at the time of the making of the complaint under oath. Is it necessary to produce the requisition of a foreign government, the certificate of the Secretary of State or any written evidence in order to secure the warrant of arrest?

As previously stated, the requisition of the foreign government and the issuance of the certificate by the Secretary of State concern only the executive branch of the Government. As far as the formal requisition is concerned, it is not necessary that it be exhibited to the court in order to secure the warrant of arrest. Furthermore, it need not be produced at any time during the hearing.[23]

What must be done with the certificate of the Secretary of State? Whenever the treaty requires a certificate of the Secretary of State, that certificate must definitely, at some point in the hearing, be exhibited to the committing magistrate. If the certificate has in fact been issued, apparently it need not be produced in order to secure the warrant of arrest.[24] However, the safest course to insure obtaining the warrant of arrest would be to produce that certificate to the committing magistrate at the time of the making of the complaint under oath, instead of waiting for the actual hearing. The same rule applies to depositions from abroad or the evidence which is to be produced at the hearing. It is not necessary that the depositions or the evidence be annexed to the complaint. It is sufficient if these depositions are presented to the court at the hearing itself.[25] However, a copy of the indictment in the foreign country and the warrant of arrest issued by the foreign government should be annexed to the complaint.[26] If one is acting on behalf of a foreign government, undoubtedly the course with the least difficulty would be to annex all the papers in one's possession to the complaint at the time the consular officer applies for the warrant.

The Hearing Is the Focal Point of the Proceeding

The hearing, of course, is the focal point of the proceeding in this country. If one keeps in mind what is involved in an extradition proceeding and the purpose of the hearing in this country, the rules with reference to the hearing follow quite logically. A person has been charged with a crime committed in a foreign country. Obviously, almost always the evidence of the commission of the crime is evidence secured abroad. The proceeding in this country is merely to determine whether the accused should be sent abroad to stand trial. There is no trial in this country. The purpose of the presentation of the evidence is to show that there is some reasonable probability that the crime charged has been committed by the person arrested in this country. The evidence must likewise show that the foreign government has jurisdiction under the

(Continued on page 346)

18. 18 U.S.C., 3184; 4 Hackworth, *Digest of International Law*, page 96.
19. 187 U.S. 181, 189.
20. 184 U.S. 270 (1901).
21. *Glucksman v. Henkel*, 221 U.S. 508, 514 (1910).
22. *In re Kelly*, 26 Fed. 852 (Circuit Ct. D. Minn. 1886); *President of the United States v. Kelly*, 92 F. 2d 603 (C.C.A. 2d 1937).
23. 187 U.S. 181; 92 F. 2d 603.
24. Hackworth, page 93; *Charlton v. Kelly*, 229 U.S. 447 (1913).
25. *Yordi v. Nolte*, 215 U.S. 227 (1909).
26. *Powell v. United States*, 206 Fed. 400, 403 (6th Cir., 1913).

Self-Advertising by Lawyers

by **Ben W. Palmer** • of the Minnesota Bar (Minneapolis)

■ In this brief article Mr. Palmer restates the ethical position of the legal profession in respect to self-advertisement. He also includes some historical sidelights on the subject of interest to both lawyer and layman.

■ Over and over again we lay to our souls the flattering unction that ours is a profession and not a business. But sometimes—breathe it not to our jealous mistress, the law—sometimes, in jaundiced mood, the grass does look a little greener in the other fellow's yard. Sometimes, like Horace's legal expert, when a client knocks at our door before cock-crow we call the farmer lucky; just as he, dragged from the country into the city to answer a summons, is envious of us. But more often, when our client is out of town and we have some unused time and energy at hand we envy the businessman his uncramped initiative. For he can go out into the highways and byways and round up grist for his mill. And the Little Boy Blues of the business world go tooting their horns across the landscape while we are condemned to silence.

For the bar association has fixed its canon against self-advertisement in no uncertain terms. And the gloss is stricter than the text. If life is a fair with each man beating his drum before his tent we must remain inside. We can hardly hang a sign outside, though our professional ancestors in the days of Rome offered their services in paintings on the walls like the red posters of Pompeii. They competed for the attention of the passer-by against election posters saying that "the barbers wish to have Trebius as aedile", or "the fruit-sellers support the candidacy of Holconius Priscus for the duumvirate". We have no wish to enter into such a competition, but if we did, we would be restrained by that sense of dignity that is the chief basis of the antiadvertisement canon. Such things "just aren't done; it's like eating peas on a knife, you know."

The canon has, of course, some support from a sound public policy that discourages incitement to litigation. We should not provoke contentions. And the public interest is further served by making professional success depend so far as possible not upon the greater willingness and capacity of any man to spend money in self-praise, but upon superior character, experience and ability. It tends to prevent the lawyer with a large professional income confessing with P. T. Barnum, "Without printer's ink, I should have been no bigger than Tom Thumb." It prevents us from taking advantage of that susceptibility of modern man to advertising, to which Chesterton referred, "If you had said to man in the stone age, 'Ugg says Ugg makes the best stone hatchets' he would have perceived a lack of disinterestedness about the testimonial." And so we should resort neither to the Roman lawyer's posters nor to the claquers he hired to applaud his forensic efforts.

And so it is that in virtuous mood we have no complaint of a ruling against lawyers giving out at Christmas, like insurance company calendars, appointment books entitled "Compliments of DODSON AND FOGG, ATTORNEYS AT LAW, Behemoth Building, Megalopolis". We concur also in the opinion that it is not permissible to break down telephone book listings into bankruptcy, claim, criminal, damage suit, collection and personal injury lawyers. But in a less virtuous mood we don't know whether to be irritated or amused by two formal opinions: one that a member of the Chicago Bar Association should not mention that fact on his professional card. This approaches the English rule that forbids a barrister having the phrase "barrister at law" upon his cards or his stationery. The other opinion is that it is no violation of the canon to send an unsolicited manuscript to the AMERICAN BAR ASSOCIATION JOURNAL. When a question such as this last is solemnly raised we wonder whether Chaucer's Man of Lawe would not be reprimanded merely for seeming busier than he was. But anyhow, whether by coercion or consent, we deny ourselves display ads, radio plugs, sandwich men and sound trucks. And as a profession we have also given up or lost the benefit of handles and of clothes.

For we no longer are called Lawyer Brown as used to be the custom. You remember, for example, Mrs. Tul-

liver at the beginning of *The Mill on the Floss*. She is discussing the good education that Tom should get and the choice of his profession. "I wouldn't make a downright lawyer o' the lad—I should be sorry for him to be a reskell—but a sort of engineer, or engineer, or a surveyor, or an auctioneer like Riley, or one of them smartish businesses as are all profits and no outlay only for a big watch-chain and a high stool. They're pretty nigh all one, and they are not far off being even wi' the law, I believe; for Riley, the auctioneer, looks Lawyer Wakem i' the face as hard as one cat looks at another." And so, since we are not introduced or known as Lawyer Brown we do not have the advantage of a professional handle to our names that doctors have. Perhaps, however, this may be a dubious advantage, since we never know whether the doctor is divinity, philosophy, horse, chiro, homeo, allo, or doctor of dental surgery.

Handles have gone and so have clothes. The apparel no longer proclaims the profession. Time was when you could tell the lawyer, at least in many localities, by his frock or Prince Albert coat. Or perhaps in his dress he was a cross between Simon Legree and Daniel Webster: broad-brimmed black hat, black tie, white shirt and a black coat whose tails flew backwards in the wind as he ran, valise in hand, to catch the train for the city or the county seat.

It may be that in some future regimented world lawyers may find compensatory or consolatory advertisement in an enforced and uniform apparel such as the Nazis a few years ago forced upon the doctors. Those attending a "National Camp for Doctors" in Thuringia were ordered to wear a uniform of "dark, loose trousers gathered in at the ankles by elastic, a double-breasted black jacket with white buttons three inches in diameter, a white sports shirt open at the neck, and a black beret."

I wonder, however, if we could take a leaf from the book of Charles and Romeo. These were a couple of young Italian lawyers of the fourteenth century who hit upon an ingenious expedient for making their virtues known to the public and thus shortening the starvation period at the beginning of their practice. The expedient is revealed in the pages of the huge manuscript encyclopedia of Dominicus Bandinus of Arezzo in the Vatican library: The Fons Memorabilia Universi. It occurs at the end of the eighth book on the planets with whose subject matter it has nothing to do. It is therefore clearly an irrelevant interpolation. The theory is that two young graduates of the famous law school, of the University of Bologna, the oldest in the world today, were eking out their slender professional earnings by an occupation common to that time before printing: the copying of manuscripts. There are a number of editions of this manuscript encyclopedia extant and all have the interpolation. It may be that it was included by other copyists in other editions because the copyists did their work mechanically and so did not notice the irrelevance. Or it may be that they did, but being paid so much per word or folio, like copying clerks in the English law offices for centuries, wanted to increase their pay by lengthening their work. If that be the case, then to the profit motive we may attribute some preservation of this part of the encyclopedia just as we attribute to that motive some of the verbosity of the forms that we use in our offices today.

Here is the interpolation, translated from the Latin:

"REJOICE BOLOGNA, mother of laws, true nurse of every study, and of all philosophers the asylum, haven and sweet nest, because, though you have made many a happy harvest from the rich crop of jurists, never in our age have you given birth more happily than with Charles and Romeo. For they as sons of legal fulness uphold your candelabrum on the right and on the left, or like the two major luminaries of the sky, shine from east to west. They are of most noble stock, but far more illustrious in their virtuous characters. They have both been educated under the most glorious doctors. They were both examined together to the delight of the doctors and, no dissenting voice being raised, they received the doctorate from the council of examiners with the plaudits of the people and in the presence of the city fathers. Now they are most useful citizens. For Charles gives most praiseworthy law lectures for the commune, while Romeo, attending to public affairs, with marvelous ease and sense aids all in consultation. But since examples move more than words, he offers such stupendous miracles concerning himself that he degenerates from the virtues neither of his father nor his ancestors, just as shoots naturally are not diverse from their root."

We don't know whether this advertisement was successful, or whether Charles and Romeo were reprimanded by an ethics committee, but we hope that their "legal fulness" was rewarded by the appreciation of their fellow men and by a lucrative practice.

As a young lawyer we appreciated the value of a hunger belt, though we could not agree with Lord Eldon that "nothing does a young lawyer so much good as to be half starved; it has a fine effect". Sometimes we were momentarily irked by the rules against advertisement or solicitation. But we were thankful that the bar association had not gone as far with the lawyers as medieval regulation of competition among guildmen. By the rules of St. Omer the seller was forbidden to greet a passer-by, blow his nose or sneeze when customers were around. Then too, there was no rule against being paged, as Roger North said young Jeffreys was, though we never resorted to the practice either in club, stadium or elsewhere. And there was none against "hinting".

Boswell, you remember, suggested "a doubt of the general opinion, that it is improper in a lawyer to solicit employment." Said Johnson, that lovable bear, "Sir, it is wrong to stir up lawsuits; but when once it

is certain that a lawsuit is to go on, there is nothing wrong in a lawyer's endeavoring that he shall have the benefit rather than another." BOSWELL. "You would not solicit employment, Sir, if you were a lawyer." JOHNSON. "No, Sir, but not because I should think it wrong, but because I should disdain it." This was a good distinction, which will be felt by men of just pride. He proceeded: "However, I would not have a lawyer to be wanting to himself in using fair means. I would have him inject a little hint now and then, to prevent his being overlooked."

So, though there be no courses on "hinting" in the law schools, there seems to be no canon against it, though there is against self-advertising.

Nominating Petitions

Florida

■ The undersigned hereby nominate E. Dixie Beggs, of Pensacola, for the office of State Delegate for and from the State of Florida to be elected in 1953 for a three-year term beginning at the adjournment of the 1953 Annual Meeting:

Scott M. Loftin, Donald Kingery Carroll, Russell L. Frink, Wayne Knight Ramsay, George W. Milam, Harold B. Wahl and Chester Bedell, of Jacksonville;

Darrey A. Davis, of Miami Beach;

Lyle D. Holcomb, Walter B. Humkey, John H. Wahl, Jr., Leo S. Julian, George T. Clark, Alfred E. Sapp and Perry A. Nichols, of Miami;

W. H. Watson, Raymond A. Hepner, William Fisher, Jr., Harold B. Crosby and Bert Lane, of Pensacola;

Cody Fowler, Morris E. White, William Albert Gillen, R. W. Shackleford and Herbert S. Phillips, of Tampa.

Florida

■ The undersigned hereby nominate James M. Wallace, Jr., of Bradenton, for the office of State Delegate for and from the State of Florida to be elected in 1953 for a three-year term beginning at the adjournment of the 1953 Annual Meeting:

Jerry R. Hussey, Robert A. Rickey, Warren M. Goodrich, Frank Schaub and Gordon B. Knowles, Jr., of Bradenton;

Lewis Rhea Baxter, W. Raymond Blackard, William H. Rogers, Charles Daughtry Towers and Waldo Stockton, of Jacksonville;

R. J. Marshall, of Palmetto;

Raleigh T. Barber, Gunby Gibbons, Miles H. Draper, Hervey Yancy, Morison Buck, A. B. Angle, Sam Bucklew, Henry A. Carrington, Paul Game and Charles I. Campbell, of Tampa;

Sherman N. Smith, Jr., John R. Gould and Marshall O. Mitchell, of Vero Beach;

M. A. Braswell, of Venice.

Missouri

■ The undersigned hereby nominate Robert L. Hecker, of Kansas City, for the office of State Delegate for and from the State of Missouri to be elected in 1953 for a three-year term beginning at the adjournment of the 1953 Annual Meeting:

Randall R. Kitt, of Chillicothe;

Robert E. Seiler and Ray Bond, of Joplin; Charles L. Carr, John H. Lathrop, Charles M. Blackmar, Hale Houts, Homer A. Cope, Clif Langsdale, Robert L. Jackson, Edwin R. Morrison, Edgar Shook, Arthur C. Popham, Jr., E. E. Thompson, Charles E. Whittaker, Walter A. Raymond and Lyman Field, of Kansas City;

John T. Barker, of Macon;

W. Wallace Fry, of Mexico;

Lynn M. Ewing, of Nevada;

Harry Gershenson, John H. Lashly, Forrest M. Hemker, Jesse W. Barrett and Ronald J. Foulis, of St. Louis.

Wisconsin

■ The undersigned hereby nominate Homer H. Benton, of Appleton, for the office of State Delegate for and from the State of Wisconsin to be elected in 1953 for a three-year term beginning at the adjournment of the 1953 Annual Meeting:

Walter H. Brummond, Frederick E. Froehlich, Andrew A. Parnell, Edwin S. Godfrey, F. Joseph Sensenbrenner and Joseph Witmer, of Appleton;

William H. Freytag and Charles E. Wilson, of Elkhorn;

Joseph D. Donohue, John P. McGalloway, Erwin A. Weinke and John J. Schneider, of Fond du Lac;

Leslie J. Valleskey, of Manitowoc;

Arnold C. Otto, Carl E. Dietze and T. Fred Baker, of Milwaukee;

John W. O'Leary, Chas. H. Velte, Lytle O. Cooke and Gaylord C. Loehning, of Neenah;

Walter J. Patri and Charles F. Nolan, of Oshkosh;

Elton S. Karrmann, of Platteville;

Herbert S. Humke, of Sheboygan;

Kenneth K. Luce, of Sussex.

Wisconsin

■ The undersigned hereby nominate Gerald P. Hayes, of Milwaukee, for the office of State Delegate for and from the State of Wisconsin to be elected in 1953 for a three-year term beginning at the adjournment of the 1953 Annual Meeting:

Alfred L. Godfrey, of Elkhorn;

John P. McGalloway, of Fond du Lac;

Philip S. Habermann, Gilson G. Glasier and Byron H. Stebbins, of Madison;

Herbert C. Hirschboeck, E. Harold Hallows, Giles F. Clark, Gerald Hayes, Jr., Bruno V. Bitker, Henry C. Friend, A. W. Schutz, Francis J. Hart, Charles S. Quarles, Charles L. Goldberg, Morris Karon, Carl B. Rix, Fred R. Wright, Albert B. Houghton, Theodore C. Bolliger, Steven E. Keane and Ralph M. Hoyt, of Milwaukee;

Vilas H. Whaley, of Racine;

Walter F. Kaye, of Rhinelander;

Miles Lambert, of Wausau.

The Microcard Foundation

by Miles O. Price • Law Librarian, Columbia University

■ The many who have been interested for the past fifteen years in the progress of microprint (on easily filable cards, as distinguished from microfilm, on motion picture film) were gratified to learn from "Tomorrow's Law Books", by Sidney Teiser, published in your May, 1952, issue (38 A.B.A.J. 378), of the entry of another major law publisher into the field, to join those who have been active in the microcard publishing of law books and patents since 1948.

The pioneer work in microprint was done shortly before World War II by Albert Boni, of the publishing house of A. & J. Boni, who developed a practical reader and printing process, the full exploitation of which was delayed by the war. The major impetus to this important new publication device, however, was given when, in 1944, Fremont Rider's *The Scholar and the Future of the Research Library*, devoted entirely to the possibilities of microprint (and with a chapter on law books) came to the attention of Charles Gelatt. Rider, a practical printer and publisher and former editor of national magazines, but now turned librarian, was thoroughly familiar not only with book publishing and distribution, but with library costs and readers' habits. Mr. Gelatt, a successful manufacturer and inventor, was on the lookout for some altruistic venture, and Mr. Rider's book seemed to point the way. A result was the formation of the nonprofit Microcard Foundation, to foster the publication of books in the new medium and to establish and maintain uniform standards, with an advisory Microcard Committee, of which the writer is a member; and the co-operation of the Eastman Kodak Company in the development of satisfactory reading machines and of processes to reduce book-size pages to microprint has been influential in a rapidly expanding publication venture, touching many fields of knowledge.

Two law publishers, Matthew Bender and Co., Inc. and Towsley Microcards, Inc., have been active since 1948. Among the publications available on microcards from these publishers are the Delaware Reports prior to the Atlantic Reporter; the very scarce New Hampshire Reports prior to the Reporter; the *New York Law Journal*, 1948 to date; the *Yale Law Journal*, Volumes 1 to 25, many of which are out of print in the original; the *Official Gazette of the United States Patent Office*, 1948 to date; and *United States Patent Specifications*, beginning with Number 2,536,001, December 26, 1950. The Records and Briefs of the Supreme Court of the United States are now being microcarded for subscribers by Matthew Bender.

The acceptance of microreproduction of books and periodicals has been more rapid and complete in the fields of science and industry than in law. The adaptability of the new medium for either library, home or laboratory use has commended itself to industrialists and scientists, with the result that the catalogue of the Microcard Foundation shows hundreds of titles in these fields, which have had a sale of many millions of cards. Sales rose from $100,000 in the fiscal year 1950 to $250,000 in 1952, the latter figure representing more than two million cards. It has been necessary to establish three branch processing plants during the year.

Publishing books in microprint has three major aspects: (1) the current publication or republication of new material, to save space and money; (2) the republication in the new medium of out-of-print or scarce material, or works not commercially publishable, as records and briefs on appeal; (3) the republication of old sets of reports and periodicals, still of sufficient value to be worth keeping in some form, but hardly justifying the expensive space they occupy on practitioners' shelves. The two publishers already active in law have specialized so far on the latter aspects.

A major difference between the present well-established Microcards and the projected publications as described by Mr. Teiser is in the size of the cards, and that there should be a difference seems unfortunate. Microcards are 3" x 5", the standard library card catalogue size, each capable of carrying up to 180 ordinary law-book-size pages, and their reader is sized to fit these cards. The new books, on the other hand, are to be 6" x 9" cards. It is my understanding that, by means of an attachment, cards can be read interchangeably on either reader. Microcard has a reader about the size of and considerably lighter than a typewriter, and costing about $125, of which a thousand are in use. There would be more, but for defense limitation on the use of metals.

Where the gain in the off-standard card appears is hard to see. The 3" x 5" card and reader are already widespread; scientific and technical material of all kinds, including the patent specifications found in so many law libraries, has already been published and distributed widely. Many of the millions of cards already published in fields other than law are required to be used by lawyers serving industrial clients, and the growth of this type of publishing is rapid. One encouraging feature in the use of the standard-sized card so

far has been the reduction in costs, even in these inflationary times, which manufacturing economies effected have permitted.

Few indeed are the case reports, statutes, law review articles or book chapters which will not be wholly contained on a single 3" x 5" card, which is easily filed in standard desktop equipment and at the saving of considerable space, or which is just as easily filed in a vest pocket for the worker who wants to take the material to his office or home. It is the boast of the publishers of Microcards that material thus published is both "filable" and "findable". It certainly is filable. The findableness is taken care of by the fact that each Microcard bears the catalogue entry of the publication reproduced—author, title, inclusive pages—in ordinary type across the top of the card, so that it is filable and findable, just as is a catalogue card. The card thus becomes both book and card catalogue.

A suggested future development in the Microcarding of law reports, which rarely occupy the space of one card, is that the individual reports be microprinted, one to a card, and the whole filed as a digest, under the American Digest System classification; or that West Publishing Company, instead of publishing the digest as at present, a digest paragraph to an entry, publish the whole report, in about the same space. Although this may seem to be a little ahead of our times, in fact it is not, in the scientific field. The enormous Navy Research Section of the Library of Congress, under a contract with the Office of Naval Research, is doing exactly that for technical material. Books, pamphlets, memoranda, maps, charts—anything of interest in the research field involved—are read and abstracted. When one hundred of these "unclassified" abstracts and seventy "classified" ones are accumulated, they are published in a "Technical Information Pilot", which is sent to those libraries, contractors and scientists entitled to receive the material. They select what they want, and then the whole matter, abstract and microcarded article in full on the reverse side of the abstract, is sent. It is given, not loaned, as it is cheaper to do this than to keep circulation records. A Gallup poll of all users some time ago revealed that, while they would prefer the "live" material, they were enthusiastic about the Microcards, as being thoroughly practical and usable.

A project closer to the lawyer is the result of the enterprise of Mrs. Huberta Prince, Librarian of the far-flung system of libraries of the Judge Advocate General of the Army. Since the branches of this service extend all over the world, in combat areas and in other areas where all equipment is subject to loss, damage and sudden moves, she has worked out a Microcard law library of twenty volumes with a total of 5,659 pages. These were reduced to 110 3" x 5" cards, about one and one-half inches in total thickness, or about twice the bulk of a deck of playing cards. So far, the JAGC is enthusiastic about it; they also would prefer printed books, but these things are thoroughly usable and wonderfully mobile.

Microcards are not as easy to read as the ordinary book. That is admitted. But they may be read for hours at a time without eyestrain. Furthermore, they permit the acquisition of material available in no other form, as appeal papers. Sooner or later lawyers, like scientists and industrialists, will come to use them, not for most of their work, but for the less-used material, the out-of-print works, or the material which is not now commercially publishable but is necessary and can be had in some sort of Microcard reproduction. Therefore, the entry of another major publisher into this field is all to the good and may be expected to speed the acceptance of this new publication medium by lawyers, who so far have lagged behind their more practical, scientific and technical brethren. These latter have been enthusiastic about it from the first.

Camera Stand

(Continued from page 291)

operated from the rear of the camera. The one illustrated at the front in Figure 1 consists of two pieces of circular plate glass that can be rotated in an entire circle, tilted to the right or left[2], also moved up or down, or moved in a horizontal direction to the right or left. These adjustments make possible the discovery of evidence which in some instances could not be produced if the questoned document were placed in stationary position.

If the problem is that of determining the sequence of lines or the solution of some other important problem, the expert is frequently handicapped if his camera and its relation to the stand is so inflexible that he cannot record on the film what should be recorded. An example of such a problem for the document photographer would be that of determining the sequence of a typewritten stroke and the impression made in the paper by a seal. Such a problem requires careful adjustment of the paper on the object board, and the testing of the results on the ground glass when the paper is moved at various angles, or is being rotated. These special adjustments under control at the rear of the camera enable the specialist to see exactly when the paper in question is in the most favorable position in relation to the lighting. Results in demonstrating photographically whether typing is over the impression in the paper or vice versa depend upon the will to achieve coupled with the kind of equipment that will make it possible. Many technical demonstrations are within the reach of the document expert when his technical knowledge together with the proper equipment are brought into the field of scientific production.

2. When the object board is tilted to the right or left, the camera back also must be altered in the correct position to maintain focus.

William Alfred Rose
City Director
Birmingham, Alabama

Walter E. Craig
State Director
Arizona

Edward L. Wright
Co-director
Arkansas

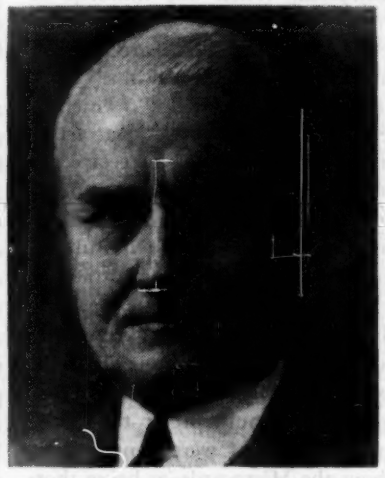
Loyd Wright
State Director
Southern California

William Fox Geesty
State Director
Connecticut

Thomas G. Meeker
City Director
New Haven, Conn.

James R. Morford
Co-director
Delaware

American Bar Center Campaign



George Maurice Morris
Chairman
Finance Committee

Leadership is being enlisted for the national campaign to obtain $1,500,000 from the legal profession as its contribution toward building the American Bar Center in Chicago.

President Robert G. Storey and the Finance Committee, headed by George Maurice Morris, already have obtained acceptances from the men whose pictures appear on these pages as State or City Directors of the campaign. Others will appear in later issues of the JOURNAL.

William Poole
Co-director
Delaware

Cody Fowler
State Director
Florida

T. M. Shackleford
City Director
Tampa, Florida

E. Smythe Gambrell
State Director
Georgia

Herbert Johnson
City Director
Atlanta, Georgia

Cubbedge Snow
City Director
Macon, Georgia

A. L. Merrill
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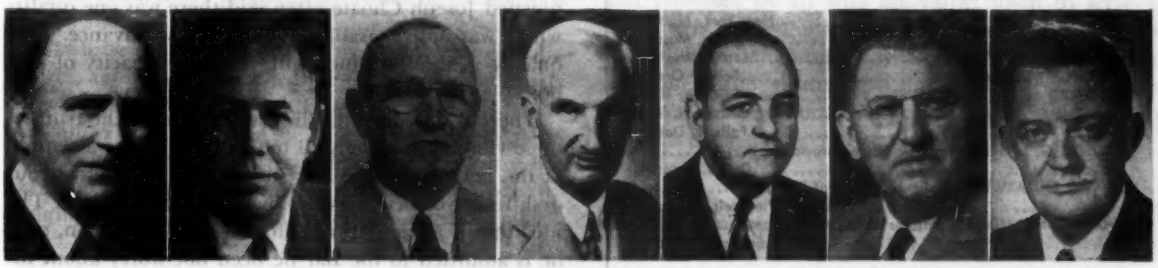

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EDITORIAL OFFICE

1140 North Dearborn Street.....Chicago 10, Ill.

Signed Articles
As one object of the *American Bar Association Journal* is to afford a forum for the free expression of members of the Bar on matters of importance, and as the widest range of opinion is necessary in order that different aspects of such matters may be presented, the editors of the *Journal* assume no responsibility for the opinions or facts in signed articles, except to the extent of expressing the view, by the fact of publication, that the subject treated is one which merits attention.

The Race

At 91 a man is entitled to give advice! This is particularly true where he is a recognized professional leader and is still working in his chosen field. Such a counsellor to the young men of the profession is Professor Samuel Williston of Harvard Law School. The other day he told an inquiring law student this:

> When I was young I tried as hard as possible to beat out the other fellow. If I had had security I probably would not have tried so hard. In these United States one cannot avoid competition, as of yet, and one better be as smart as he can. I recognize it is hard for the person on the losing side of the competition. It is a hard thing of life, but nevertheless we have to try to achieve the best, and that cannot be done without competition. It is a race and I believe in the race.

Many will recall Lord Erskine's reputed comment after his first—and successful—appearance in court as a barrister:

> I thought I heard my little children plucking at my robe and crying to me, "Now, Father, is the time to get us bread."

It has been observed that famous men usually are the product of an unhappy childhood, the fruit of adversity. Robert Burton went so far as to observe in his *Anatomy of Melancholy* that the illegitimate sons of princes had founded the ancient families in almost every kingdom, and added: "Their worthiest captains, best wits, greatest scholars, bravest spirits, in all our Annals, have been base." Thus credence is given to the notion that stern circumstances in youth, the impact of adversity, the lash of poverty and the spur of insecurity all help to develop that indomitable will which insures success. Great accomplishments are often the result of an unswerving fixity of purpose which keeps a man ruthlessly on the course fixed by the pole star of his ambition. The renowned Joseph Choate often said there was one quality which was indispensable if a man was to advance. That quality is absolute, incessant, undying tenacity of purpose.

There is no doubt much history to prove the truth of these views. It may be well to call them to the attention of the next eager-eyed law student who sits across your desk from you seeking employment as a law clerk. The idea that if a student can afford a legal education, once he is admitted to the Bar he need not worry about his economic future, is just plain poppycock. Many lawyers never conquer adversity. Many succumb in the race to support themselves financially in the profession of the law. Another more cunning group live by their wits in the law business—by practicing with market-place ethics. Before a lawyer can count on economic success at the Bar, he must add experience to study, and judgment to learning. This takes both time and money. While it is true that adversity should produce industry in a man, it may also breed indifference. Instead of humility, it may bring forth only dejection, disgust—and finally despair. Let the young man see this as the measure of his own character from the very beginning.

The law involves the keenest kind of intellectual competition. A lawyer seldom sees the whole chessboard of life or all the men on it, nor does he always understand their mystic movements. He will need again and again that soldierly quality of blind, tenacious devotion to duty in his client's service. Without these elements burned indelibly into his very soul, he can hardly expect to accomplish great action. Yes, vigorous competition is of infinite value in the law. Life in the law is a race. May the best man win!

Editorial From a Member of Our ADVISORY BOARD

Toward a Better Bar Examination

The National Conference of Bar Examiners has taken a long step forward towards its goal of providing better bar examinations for the several states. At its 1952 meeting in San Francisco it was decided to launch a program of collecting and distributing examination questions for the use of examiners throughout the country. To implement this program a Bar Examination Service Committee has been created to act as an agency

for collecting and distributing questions and answers. The committe will also make statistical services available to examining boards throughout the country.

The new plan, which is now being put into operation, calls for the assembling by the committee of a large number of carefully prepared questions in the subjects usually included in state bar examinations. Each question will be supported by an analysis, a suggested valid answer, and briefs. These will be made available to any bar examiner who desires this type of help. It is hoped that under such a system the burden of individual examiners may be made lighter and that the quality of bar examinations may be improved without in any way infringing upon the freedom of each state examining board to determine the scope and character of the state examinations.

The preparation of a good examination question which fairly reflects the subject which it is intended to cover and yet which contains no trick or catch is an art not possessed by all who are called upon to serve as examiners. It is the hope of the Conference that the service it is inaugurating will be of use to individual examiners and gradually demonstrate the value of a national examination of the type now used in the professions of medicine and accounting.

GEORGE H. TURNER

Lincoln, Nebraska

Japanese To Receive American Law Books

■ Steps taken by the Japanese Government to duplicate in that country the judicial system of the United States have been given tangible encouragement by the American Bar Association.

During the Mid-Year Meeting in Chicago in February, the Board of Governors announced that a gift of American Law books, valued at more than $7,500, has been made to the Law School of the University of Tokyo for the use of lawyers and judges in Japan. The West Publishing Company of St. Paul, Minnesota, presented the books to the Association, which in turn made the gift to the Japanese university. The shipment consisted of more than 1,000 volumes of basic materials dealing with American laws and courts.

The gift had its genesis in a visit to Tokyo last September by President Robert G. Storey, where he learned that in the process of following the American court system the Japanese Bar and judges were in need of a complete American law library. The nucleus of such a library existed at the University of Tokyo, and it is now to be completed through the Association's action.

Negotiations for the American gift were carried on with President Storey by Ben Bruce Blakeney, an American lawyer now practicing in Tokyo and serving as a part-time instructor on the University of Tokyo law school faculty. Mr. Blakeney formerly resided in Oklahoma City, Oklahoma.

Books for Lawyers

A MAN OF LAW'S TALE, *The Reminiscences of the Rt. Hon. Lord Macmillan, P.C., G.C.V.O., LL.D., D.C.L. New York: St. Martin's Press. 1952. $4.50. Pages viii, 379.*

This is a book for lawyers and especially for prospective lawyers who often stand in need of an example of what may be done in the profession through ability, industry and public spirit. Such, however, is its charm of style and its breadth of interests, reflecting, as it does, the vivid personality of its author, that it will also attract many lay readers who will derive pleasure from witnessing a superior legal mind portraying his professional work and his many avocations without ostentation but with that remarkable zest for living and for doing that was his. The book might well have been given the subtitle "A Study in Loyalties", for one of the author's outstanding traits was that, as he climbed the ladder of professional success and constantly assumed larger private and public responsibilities, he never forgot old friends or old interests. For the hundreds of members of the American Bar Association who became acquainted with Lord Macmillan and his charming wife on their visits to our meetings in 1930 and 1938 and for the much larger number whose intellectual life has been enriched by reading his occasional addresses, collected in *Law & Other Things*,[1] each of them a substantial contribution to the literature of the law and of the arts and sciences that surround or permeate it, this volume of reminiscences will have especial significance. Not unearned was the tribute of his colleagues of the Judicial Committee of the Privy Council on his death on September 5, 1952, as his memoirs were about to be published:

> A brilliant advocate, a sound, judicious and careful judge, and a loved and affectionate comrade whose presence will long be missed and cannot be replaced.

Lord Macmillan was ever a true son of Scotland. His father, who as a boy carried a peat in his hand each day from his own homestead to help warm the little school at Aberfeldy, rose to be a distinguished Presbyterian divine and a naturalist with a flair for popular exposition. On his mother's side were several outstanding lawyers. An only son with five older sisters, he rewarded the sacrifices of his parents in his behalf by distinguishing himself first by graduating at 19 from the University of Edinburgh with high honors in philosophy and then from the University of Glasgow, where he led his class in law, winning the Cunningham scholarship for excellence in conveyancing. There he attended lectures (American law school deans and students will please note!) at 8 A.M. and 5:30 P.M., spending the day as an apprentice to a firm of Glasgow solicitors and doing his studying at home at night.

After completing his three years' apprenticeship he returned to Edinburgh, where he spent a year "devilling" for a distinguished advocate, Charles J. Guthrie, later Lord Guthrie. Admitted as an advocate in 1897, he employed the inescapable period of waiting for clients by giving law lectures at the University of Glasgow and elsewhere and by writing articles for a legal encyclopedia and other publications, even producing a small volume on joint stock companies.

> To get his name on the title page of a useful law book has always been recognized as one of the few legitimate methods of publicity open to an aspiring member of the Bar.

And young Macmillan, we may be sure, left no legitimate road to recognition untried for he was impatient to marry. His success in this work led to his selection as the youthful editor of the *Juridical Review* (the Scottish counterpart of the English *Law Quarterly Review*) which he edited from 1900 to 1907. Academic recognition in his case was a forerunner of achievement as an advocate, where he excelled in municipal annexation cases and railroad litigation especially at the Parliamentary Bar, a type of litigation that gave play to his remarkable capacity for quickly mastering the most complicated factual situations, for placing his finger on the crucial issues, and for explaining them briefly, persuasively and truthfully. "Nothing is more fatal to success at the Parliamentary Bar than to attempt to suppress or misrepresent any point", good advice, it is submitted, when practicing before any judge. To these great powers of mind were added a rich voice with a slight but attractive Scotch accent, a gift of pointed expression illuminated by the broadest culture in many fields which always lent light and grace to even the weightiest subjects, a quick wit and native friendliness. English as well as Scottish railroads and public bodies soon sought him out and his work frequently took him before the House of Lords, the Judicial Committee of the Privy Council, and the committees of the English Parliament, where he came to represent, among many others, the corporations of Edinburgh and of Glasgow (agreed in their rivalry on one thing at least!), the Dominion of Canada and the Commonwealth of Australia as standing counsel. It is amusing to read how rival railroad companies competed to retain him as the new year was born which brought them into legal existence and it inspires respect to learn

> I had my own ideas to what was fair remuneration and I thought that harm was sometimes being done to the profession by requiring excessive fees. I gave my clerk directions accordingly, and I have never had any reason to be

1. Cambridge, 1937.

> dissatisfied with the result. In one very important matter I declined to be paid on the scale proposed and made my own terms on a more moderate basis. The sequel was that my clients, when the case was over and I had lost it for them, protested that I had been underpaid and insisted on my accepting a further fee of 1500 guineas.

Although Macmillan frankly preferred the courtroom to the hustings, he quotes with approval the words of F. S. Oliver:

> Politics is the noblest career that any man can choose. Stout must be hearts of those who take so great a risk and who dedicate themselves—souls as well as bodies—to the service of their country.

He campaigned for the House of Commons in East Lothian in 1913, but fortunately for his professional career the outbreak of World War I called for a cessation of politics and the election was postponed. It was this strange turn of the wheel of fortune that made possible his appointment on a nonpartisan basis, but with the approval of his own Conservative Party, as Lord Advocate of Scotland by Ramsey MacDonald in the first Labour Cabinet in Great Britain. "No one is ever likely to be at one and the same time a member of the Labour Government and a member of the Carlton Club", and yet such was his ability, integrity and forthrightness that the arrangement gave satisfaction to all. Here, as always, he was called on for services far outside the scope of his office.

The fall of the MacDonald ministry necessitated a momentous decision. He had had a practice in Edinburgh unrivalled by any Scottish advocate. He decided, however, not to return to Edinburgh but to stay on in London, although not a member of the English Bar, and to practice before the House of Lords, the Judicial Committee of the Privy Council and the committees of Parliament, all places where his especial gifts as an advocate would have their fullest play. In London, as in Edinburgh, he soon led the field.

Notwithstanding his great practice, he always found time, first in Edinburgh and then in London, to serve on a remarkably wide variety of public commissions, generally as chairman, where the traits that distinguished him at the bar often enabled him to produce unanimous reports even on the most controversial subjects. Says his colleague, former Lord Chancellor Viscount Maugham, in an appreciation written after his death:

> His mind was of such a quality that it could approach any subject with a certainty that it would find no difficulty in passing through the gate of knowledge. He became a master of the subject, and so as time went on his life became many sided and surprising in the variety of its interests.

In short, his was the rare kind of mind that actually enjoyed thinking, no matter what the problem presented to him might be. To a high degree he had the ability that is the mark of an educated man of reaching a decision on all the available evidence at the moment when a decision is necessary. And despite none too robust health he also had the capacity, so essential to professional success, for sustained, intensive intellectual labor (working "at a stretch" is a phrase found more than once in his book). The list of commissions on which he served is long and their subjects various. They range from the Royal Commission on Lunacy and Mental Disorders to the Committee on Finance and Industry, from the Committee on the British Pharmacopoeia to the departmental committee on street offenses. His work on the Royal Commission on Canadian Banking and Currency is typical of his methods. In less than two months the commission held hearings in every Canadian province and made a complete report which resulted in a Central Bank of Canada.

In 1895 while still a law apprentice in Glasgow, Macmillan answered the question, "What is your chief ambition?" by writing down "To be a Lord of Appeal"—an ambition that was realized thirty-five years later in the unusual circumstance of knowing in advance that whatever party was in power such an appointment would be tendered him in the event of a vacancy. When the tender came, writes Lord Macmillan:

> There could be but one answer. . . . Advocacy is an enthralling vocation but an exhausting one and after many years of it one grows a little weary of throwing all one's energies into other people's disputes. It becomes increasingly difficult to keep up a head of steam in the boiler. The unique advantage of the Bar as a profession is that it offers in their later years to those who have succeeded in it the sanctuary of the Bench where they may continue to serve the law in a serener atmosphere and turn to useful account the garnered stores of their experience.

Lord Macmillan is justly proud of his judicial work. His description of his method of preparing opinions is interesting:

> I never dictated my judgments. When I had made up my mind on the question involved I first wrote out as a basis a rough draft in which I made sure that all the points were included and then I made a fair copy in which I arranged the sequence of the argument, cut out superfluities, and tried to improve the writing.

It all sounds quite simple, does it not, as you read it, but try it! Like every great Scotch lawyer summoned to the British Bench from Lord Mansfield on, he was more concerned with principle than precedent: "The Scottish judges have always been more interested in principle than in precedent". In commenting on his opinion in *Donoghue* v. *Stevenson*, [1932] A.C. 562; 1932 S.C. (H. L.) 31, the case of "The Snail in the Ginger Beer Bottle" he says:

> Lord Buckmaster employed all his mastery of argument in a vigorous, almost violent, demolition of Mrs. Donoghue's contention which he declared to be unsupportable by any common-law proposition. . . . I confess I had no doubt that the appellant had stated a relevant case and I remained unmoved by Lord Buckmaster's appeal to those who differed from him not to disturb with impious hands the settled law of the land.

Lord Macmillan had a marked preference for the work of the Judicial Committee with the novel and important questions coming to it from the four quarters of the globe. He quotes with amusement the re-

port of an Indian businessman to his associates in India on the questions asked by the judges on the oral argument:

> We have had over a thousand such remarks so far and God alone knows how many more we will have yet. In short, I might say that the points on which we were doubtful have all been cleared by Their Lordships themselves.

No two sentences could better point up the differences between British appellate arguments and ours. It is not unusual for an appeal there to take a week or two. Counsel are under no restrictions as to time except that they must not waste it. If a judge wishes to know more about any question of fact or a proposition of law, he asks questions and counsel, if his case is a good one, is glad to answer, for it gives him an opportunity to inform the judge on a point as to which he may be in doubt, but without the loss, as here, of any part of his time for argument. The result is, I have been told by an official of the Committee, that in almost every case counsel know at the end of the argument from the expressions of the judges not only who will win but in four cases out of five on what point.

As with every distinguished advocate who has gone on the appellate Bench, there is the inevitable debate as to whether Lord Macmillan was as great on the Bench as he was at the Bar, a fruitless debate always, because it involves an attempt to compare two things that are so utterly different as to be incapable of comparison. The judgment of *The Law Quarterly Review* on his judicial work is sound: "He fully maintained the tradition that the Lords of Appeal coming from north of the border, owing to their different training, make an invaluable contribution to the development of the law".[2] One thing that may have served to detract from the lustre of Lord Macmillan's judicial reputation at home has been the difficulty of many in the profession in understanding how anyone could do as many things as Lord Macmillan did and do them all well. Such versatility is especially likely to be misunderstood when coupled with a joyous temperament and a zest for living that refuses to conform to the traditional pattern of judicial gravity masquerading as profundity.

One senses in reading these reminiscences that much as the judge rejoiced in the achievement of his youthful ambition, he found even greater joy in his "extracurricular activities" in the law as well as in other directions, and who can say that, as with so many other great men, these by-products of his life were not as important as the fruits of his principal vocation? His appointment to royal commissions and committees continued, too many to be enumerated in this brief review. Closer to his heart was his work as chairman of the Great Ormond Street Hospital for Sick Children, his organization of the Stair Society to encourage the study of the history of Scots law by publishing original documents, his chairmanship of the Committee to establish an Institute of Advanced Legal Studies in London, the transformation of the library of the Faculty of Advocates into the National Library of Scotland, in which he was the moving spirit, the chairmanship of the Court (the governing board) of the University of London for fourteen years, the British Museum of which he was a trustee and a member of the Standing Company for sixteen years, and his work as one of the original trustees and for many years president of the Pilgrim Trust, founded in 1930 by Edward S. Harkness "for charitable purposes in Great Britain and Northern Ireland".

His was an enviable record of unselfish accomplishment in the public interest, for Lord Macmillan never merely held office. If he accepted a post, it was to transform it, enlarge it and to dedicate it to a higher and greater usefulness. What other judge or lawyer of our time can rival him in such achievements?

With it all he found time for literature and the widest range of culture, for nature and science, for travel and vacationing, so essential to his health, especially in his beloved Highlands of Scotland, for friendship and a singularly happy home life, all of which is reflected in his book. It would be impossible for the printed page to capture in full measure his gayety, his zest for living, his urbanity, and his friendliness, but they are there in quick flashes. A certain Scotch judge is characterized as a "pearl dissolved in vinegar". There is no sighing over the good old days now gone beyond recall except a passing reference to "the years when it was still possible to practice the pleasant art of hospitality and before the austerities of war and the Welfare State turned us all into social isolationists". And what a wealth of wisdom in his reference to Sir Alexander Grant, the benefactor of the National Library of Scotland:

> He was one of those who could bestow benefits and still retain friendships.

And what understanding of those international congresses of lawyers where each speaker waited

> with obvious impatience for the speaker before him to finish. Interest was chiefly concentrated on the bulk of the manuscript produced, the rate at which its leaves were turned over and the end brought nearer.

What a rare spirit and what a rare book! He lived more deeply in the law than most lawyers and yet the lawyer never absorbed the man, but rather everything the man did or was, contributed to his work as lawyer or judge. In an epilogue he speaks of his intention to add "some random memories of scenes and experiences of happiness and beauty which have meant far more to me" than "all this talk of courts and cases and committees. But the admonition of my publishers warns me that I have already exceeded the economic limits of such a book as this in these days of austerity. So I shall keep the joys of my secret garden to myself, and perhaps it is better so." For the glimpses into the secret garden of this rare spirit in the law that this book affords, we are grateful.

ARTHUR T. VANDERBILT
Chief Justice
Supreme Court of New Jersey

2. 68 Law Q. Rev. 429 (1952).

THE JUDICIAL HUMORIST. *Edited by William L. Prosser. Boston: Little, Brown and Company. 1952. $5.00. Pages 284.*

The editor is no salesman. His first sentence is "Judicial humor is a dreadful thing." He goes on to say that the Bench is "not an appropriate place for unseemly levity although on rare occasions there are litigants deserving only of ridicule and situations that call only for mirth." He has selected some forty extracts from judicial opinions and says that "If it is possible for judges to be funny—and I mean deliberately and intentionally funny—these are opinions in which they have done it. Or at least they have tried."

The most carping reviewer would have to admit that the forty judges tried—very hard. Perhaps that is why they did not succeed better. Humor is rarely at its best unless it is spontaneous. Judges who try too hard forget the need of brevity and overstrain their power to compel attention. An example of short and pithy humor is Judge Gaynor's rhetorical question finding the evidence of adultery sufficient: "What did they register in a hotel as man and wife and retire to a bedroom for? We have it of old that 'it is presumed he saith not a *pater noster*' there."

Nonetheless there is much which will interest and amuse the lawyer—and the layman, too. They will learn the nature of judicial humor even if they do not laugh very much in the process. Your reviewer looked in vain for the poem, "The Path of the Law", quoted in the dissenting opinion of Judge Scott in *Van Kleeck* v. *Ramer*, 156 Pac. 1108, 1121. Perhaps other readers will follow this precedent and send in their favorite quotations. In this way the book, besides giving pleasure to its readers, will result in the collection of other examples of humor.

Of the nonjudicial writings, your reviewer most enjoyed "Constitutional Metaphors" by Professor Thomas Reed Powell, wherein he reviews James M. Beck's ***The Constitution of the United States***. As an example of devastating irony, it ranks high. It may be a little cruel, but writers who overindulge in metaphor and hyperbole and who quote poetry in oral argument to the Supreme Court deserve no coddling. It is fair criticism for Mr. Powell to say "It makes you see how marvelous the Supreme Court really is when it can be a balance wheel at the beginning of a chapter and a lighthouse at the end."

One item in the book justifies everything. That is a reproduction of the correspondence in the Rent Control Departments of the Office of Price Administration during the war. This correspondence was the result of the unusual but perfectly understandable request for a ruling whether there had been a demand for increased rent under the circumstances that a landlord, who formerly had allowed occupancy of an apartment by a widow and three adult daughters, in consideration that "all four of us we du it or we muve out" and then, later, when a fourth daughter of eighteen joined the family, demanded that "she du it too". One of the office workers is eventually driven to resign and, in the final letter, notifies the Department that he has done so and that his home address is now the same as that of the widow and her four daughters. Apart from the unique legal features of the case, there is an abundance of humor in the parody on the customary ring-around-a-rosey procedures in such departments. It is a good guess that this is from the pen of another professor—the editor of the book.

HARRISON TWEED
New York, New York

LEGAL RESEARCH. *By Rebecca Notz. Chicago: Callaghan & Company. 1952. $7.50. Pages 396.*

Professor Notz, in the third edition of *Legal Bibliography and Legal Research*, has presented the legal profession, as well as students of law, with the most practical manual of its kind yet to be issued. She has completely rewritten and reorganized her popular second edition and has added to it a forty-two-page list of legal abbreviations. In this new edition she has substituted for the earlier division of the text into "Legal Bibliography" and "Legal Research" a more effective arrangement in which the explanation of the use of the various types of publication immediately follows the description of them. Part I deals with "Legal Research in General", Part II with "Statutory Law", Part III with "Court Reports", Part IV with "General Legal Search Books", Part V with "English Law", Part VI with bibliographical "Notes", and Part VII with "Abbreviations."

No words are wasted on unnecessary data concerning the history and development of the materials. The author at all points rightly assumes that the user of the work is interested in practical rather than merely cultural information and for that reason leaves to others the historical treatment of the subject.

While the treatment is clear and concise throughout, it is at the same time comprehensive. Discussion is not confined merely to a few of the outstanding works. All legal items which are likely to be used by the lawyer are included. Much attention is devoted to the field of federal law—a field of research in which the author has had many years of experience.

Part VI, "Notes", provides a well-organized, comprehensive, classified index to currently useful legal literature. It includes official materials, both federal and state, general research material, legal periodicals, loose-leaf services, treatises, etc.

Part VII, "Abbreviations", is a new feature. The list is comprehensive and up-to-date.

A forty-page index provides an excellent key to the whole.

FRANCIS X. DWYER
Law Library of Congress
Washington, D. C.

YOUR MARRIAGE AND THE LAW. *By Harriet F. Pilpel and Theodora Zavin: Rinehart and Company, Inc. 1952. $3.95. Pages, xv, 358.*

As the title suggests, this book is not, and it frankly disclaims being,

a lawyers' lawbook. To judge it fairly, one must recognize its restricted purpose.

With enviable confidence and adventurousness, the authors have undertaken to tell the layman, in language that he can understand, about the laws of forty-eight states on forty-eight or more topics of law related to sex, courtship and matrimony. Artificial insemination, sterilization, criminal conversation, sex and the criminal law, the illegitimate child, and abortion are a few of the many topics and titles; the others embraced within the comprehensive scope, including four on divorce, are the easily imagined and more likely to be mentioned in prim and sedate conversation.

The authors are women, and, if you will not deny them a full measure of maturity, let us say "young women". Each is a successful practicing attorney, married and a mother of two children, and each has an outstanding scholastic record.

The authors have done exceedingly well, and with noticeable linguistic skill, what they undertook to do; and this reviewer, empathically recognizing their prodigious effort, can only hope that he is wrong in seriously doubting that the results of their efforts will be gratifyingly commensurate.

The book is full of such expressions as "In some states the law is . . ."; "In many states . . ."; "In other states . . ."; "In the majority of states . . .". Of course, many times certain states are named. But the layman, who probably would like to know the law of his own state, is certain to come to bewilderment upon reading the text. Therein lies a possible value: the book may send many bewildered persons to law offices.

The work is devoid of documentation. Writing primarily for the layman, the authors perhaps are to be commended for saving him the menace and annoyance of footnotes; but a reference table at the back of the book could have been handled easily, even without the usual small reference numbers in the text, simply by referring to the page numbers. In failing to provide such a table the authors overlooked a vital adjunct, if they intended to have lawyers among their readers.

The bibliophile will have no trouble finding on his shelves books for the layman which, although dealing with neither law nor science, do have reference tables. To a lawyer, the telling of a legal case without citation is only a story; with citation, it becomes law and a possible weapon.

The book leaves one with the happy realization that we still are forty-eight states, each with a large measure of autonomy; and the authors are to be commended for the fact that, although their own views are sprinkled freely through the book, they do not urge obliterating the healthful variety that challenged them to so much labor.

WILLIAM J. PALMER
Los Angeles, California

THIS STAR OF ENGLAND. *By Dorothy and Charlton Ogburn. New York: Coward McCann, Inc. 1952. $10.00. Pages xiv, 1297.*

The purpose of this book is to prove that the plays and sonnets accredited to William Shakespeare were in fact written by Edward De Vere, seventeenth Earl of Oxford. The book is an astounding exemplification of research, scholarship and exposition. But in spite of the merit of the work, its logical marshalling of facts and convincing argument, it is not likely to have much effect on the now generally accepted Shakespeare tradition.

In the town where I lived as a young man there was a wealthy but illiterate woman who asked, "Who wrote Shakespeare?" The incident continued to cause presumptuous mirth for a long time. One day someone suggested that if the question had been, "Who wrote the works attributed to Shakespeare?" it would have presented a problem that had worried many literary scholars. But that comment got short shrift. Those who indulged their mirth and vanity over the wealthy woman's assumption that Shakespeare was a book, themselves were blissfully ignorant of the great likelihood that Shakespeare was only a nom de plume.

So this book can hardly fulfill its purpose against the now generally fixed idea as to the authorship of the Shakespearean plays. In the foreword the mere hope is expressed that "Surely some of the Shakespearean scholars will be sufficiently pure in heart to accept the revelation of the truth, painful wrench though the readjustment may at first be."

But the failure of the book to accomplish fully its purpose is no gauge of its merit or usefulness. It is an intriguing problem deftly discussed. Those who like the solution of mysteries should be fascinated by this book. All who have enjoyed the great tragedies and comedies will gain a more profound understanding of them, a higher appreciation of the genius they display, by a consideration of the work of the Ogburns.

Regardless of the presumptuous and conceited self-praise of the late George Bernard Shaw and his disparaging remarks about Shakespeare, the greatest literary accomplishment in the world, the most profound and brilliant creative writing, is found in the Shakespearean plays. The interesting life of Edward De Vere, and the review of the brilliant reign of Queen Elizabeth, while well worth while in themselves, also add interest and lustre to the great literary accomplishment of the Renaissance.

It is a remarkable coincidence that at this time, the beginning of the reign of the present beloved English Queen, two books should appear which review so interestingly the reigns of two other great English Queens. *This Star of England* revives the characters and events of the time of Queen Elizabeth I and *The Age of Paradox,* by John W. Dodds (Rinehart & Co., New York, Toronto) presents the very essence and events of the Victorian era. It is only by reviewing past times that we are enabled to see our own time in proper perspective, and thus escape the fate of being victims of our age.

ROBERT N. WILKIN
Charlottesville, Virginia

FORENSIC PSYCHIATRY. *By Henry A. Davidson, M.D. New York: The Ronald Press Company. 1952. $8.00. Pages viii, 398.*

PSYCHIATRY AND THE LAW. *By Manfred S. Guttmacher, M.D., and Henry Weihofen. New York: W. W. Norton & Co., Inc. 1952. $7.50. Pages viii, 476.*

The appearance of these two volumes, almost simultaneously, is an event of importance in legal psychiatry. When we bear in mind the marked progress of psychiatry during the last quarter century, each one of these books may fairly be said to be superior to any texts previously available to lawyers. Recently, there have been many helpful volumes, such as Strecker, *Fundamentals of Psychiatry*, and Overholser and Richmond, *Handbook of Psychiatry*, but they were not aimed so exclusively toward lawyer use as was Singer and Krohn, *Insanity and the Law*, which appeared in 1924. A genuine need for just such books as these had developed.

The major problem in this field, perhaps, has long been that law and psychiatry have been two distinct systems, each with its own language and concepts, often facing the same questions of human conduct but unable to blend their learning effectively. The "cross-pollination and cross-fertilization of these related specialties" will benefit both and, in doing so, serve the "public good".* Both of the volumes under review have made distinct contributions in this direction. Dr. Davidson's extensive experience with courts and legal problems increases the value of his comments; he not only reveals an unusual grasp of legal questions but, what is rarer, a sympathetic understanding of legal rules. Dr. Guttmacher, an official court psychiatrist, has pooled his extensive learning and experience with Mr. Weihofen's mastery of the law of insanity (he is author of the standard text, *Insanity as a Defense in Criminal Law*) to produce an excellent integration of law and psychiatry in legal situations involving the mental element. There are legal and psychiatric authorities cited throughout both books, but, as would be expected, Mr. Weihofen's legal references are more frequent, his notes more extensive, and the citations are selected with greater care as to immediate availability to lawyers. However, Dr. Davidson has sought to arrange his material under the appropriate *legal* topics, whereas the other authors have leaned more to a psychiatric grouping; for example, the former discusses "traumatic psychosis" as a subhead of the chapter on "Personal Injury Evaluation", while the latter discuss it as merely a part of the chapter on "The Psychoneuroses". The appendix material in the Davidson text alone will justify its purchase by many lawyers, since it is not readily obtainable elsewhere; here are given a *legal* lexicon for doctors and a *psychiatric* glossary for lawyers, a series of elaborate "examination guides" revealing the pertinent "facts" to be presented in the most frequent legal controversies involving mentality, and the "model act" covering hospitalization of the mentally ill. Dr. Davidson showed an admirable restraint in discussing involved theory and in giving lengthy "case studies" of individuals; his very readable work is full of wise counsel to lawyers and psychiatrists alike, continually bringing them closer together in their thinking while increasing the respect of the one for the other. However, the lawyer forced to choose one or the other (actually each is an excellent supplement to the other), once he has become familiar with the book, will probably prefer the Guttmacher-Weihofen as the more quotable textbook of the two for general reference work. Neither book will make a psychiatrist out of a lawyer, but both books defend, as psychiatrically sound, many legal rules which have been subject to attack, and either book will open to lawyers new fields for the use of psychiatry in law.

Lawyers will be interested in the "coverage" in terms of topics. Dr. Davidson's text falls under two major heads: "The Content of Forensic Psychiatry" covering such topics as "marriage and divorce", "custody of children", "wills", "sex offender" and "malingering"; and "The Tactics of Testimony" dealing with "preparation for court", the direct and cross-examination of the psychiatrist, the "hypothetical question", and related matters. The Guttmacher-Weihofen volume is divided into nineteen chapters, ranging from such topics as "personality formation", "manic-depressive and schizophrenic psychoses", and "psychopaths" through the "psychiatrist on the witness stand" to "mental incompetency" and an extended treatment of "mental disorder and the criminal". Both books give tables of the legal cases cited, but the Guttmacher-Weihofen treatise has the more extensive list. The Davidson book opens with a discussion of "criminal responsibility" and the Guttmacher-Weihofen volume draws to a close with three chapters on the subject; thus, both discussions reflect the tremendous number of scholarly articles, psychiatric and legal, bearing upon this long-recognized problem. However, both books go well beyond such "old" subjects as "legal insanity", "alcoholism" and "capacity to make a will"; for example, Dr. Davidson reveals the very real aid a psychiatrist can give in evaluating a personal injury, and Guttmacher-Weihofen present an informative chapter on the psychiatric appraisal of testimonial evidence.

Both books are remarkably free of the bitter, carping attacks on the law which have marred much psychiatric writing. The authors reveal an admirable grasp, and appreciation, of legal reasoning and objectives, born, no doubt, of their extensive contacts with lawyers and legal agencies. Guttmacher and Weihofen even recognize that "law, dealing as it does so largely with problems of human behavior, is itself a subtreasury of time-tested psychology, most of it quite sound". However, this point of

*See pages 24-25, Gardner, "Insanity as a Defense in North Carolina Criminal Law", 30 N. C. Law Review 4 (December, 1951), discussing this problem more fully.

view does not blind them to real weaknesses in the law; for example, both books are sharply critical of the outmoded "faculty psychology" embodied in the right-from-wrong test, and these authors offer many sound suggestions for improving procedures for examination and commitment of the mentally ill. No lawyer can examine these volumes without being impressed by the very substantial aid which the discipline of psychiatry can bring to the courts in solving the ever-vexing problems of the mental element in law. These three authors —Dr. Davidson, Dr. Guttmacher and Professor Weihofen—have made distinct contributions to the field of legal psychiatry, and have rendered real service to both psychiatry and law in focusing the learning of each upon the problems they face in common. I congratulate the authors and commend their works to the legal profession.

DILLARD S. GARDNER
Raleigh, North Carolina

Practicing lawyer's guide to the current LAW MAGAZINES

Arthur John Keeffe • Editor-in-Charge

JURY: There is an interesting article in the June, 1952, issue of the *Missouri Law Review* (Vol. 17—No. 3; pages 235-251) entitled "Jurors on Trial", by Harold M. Hoffman and Joseph Bradley, third-year Yale law students with a foreword by Judge Jerome Frank, of the United States Court of Appeals for the Second Circuit, who also acts as a professor at Yale Law School. Apparently Messrs. Hoffman and Bradley were students of Judge Frank at Yale and their article consists of a study of the efficiency of the jury system by interrogating jurors as to their experiences and duties as jurors. The tests were run on individual juries immediately after they had rendered their verdict. In 1947 Judge Frank attempted a similar study but the judges approached by his students ruled the project improper. "Hoffman and Bradley were luckier." Here are some of the subjects as to which these students inquired: "Does the jury try the lawyer?"; "does the jury ignore instructions by the judge to disregard a statement previously made?"; "does the jury tend to presume guilt merely because the defendant has been indicted?"; "do the legal technicalities confuse and annoy the jury?" The jury system in recent years has had its defenders (Hartshorn, 35 A.B.A.J., 113; Goodman replying to Judge Frank, 177 *Colliers* 24 (April 21, 1951); Wigmore 12 *J. Am. Jud. Soc.*, 166) and critics (Frank, *Law and the Modern Mind*, 181; Duane, 12 *J. Am. Jud. Soc.*, 137; Clark and Shulman, 43 *Yale Law Journal*, 867; Judge John J. Parker of the United States Court of Appeals for the Fourth Circuit as to the federal jury system in 35 *Georgetown Law Journal* 500). Recently there was added to this list a valuable study by Charles B. La Voe, a retired New York lawyer, of how the New York jury system works. His piece in the *Cornell Law Quarterly* is entitled "Contrasts in the New York Jury System" (Vol. 36, No. 4; pages 689-699). (For the Missouri article address: Missouri Law Review, Columbia, Missouri; price for a single copy: 1.00.)

TAXATION—Summary of "Proof of Value by Opinion Testimony in Tax Court Trials" by Emmanuel L. Gordon, *Utah Law Review* (Volume 3—No. 1; pages 9-29). The purpose of the article is to consider the use of opinion testimony in the proof of value before the Tax Court rather than the valuation of specific types of property. The court has, in general, declined to be bound by set formulas for value determination. In those cases where formulas have been availed of, such as in the valuation of realty and good will, the formula has been used as an orderly means of collating the necessary data and opinions rather than as a mechanical device. To qualify as an opinion witness whose testimony will be accorded weight, it must be shown that he was familiar with the property in question and with the value of similar types of property. The credibility of the expert's testimony will depend largely on the value standard used, opinions based on hypothetical situations being accorded the least weight. A determination of fair market value by the Commissioner, unless made for the first time in his answer or subsequent thereto, is prima facie correct, and it is not sufficient that the taxpayer establish error in this determination. The taxpayer must also introduce affirmative evidence from which the correct value can be determined. Where conflicting opinion evidence is introduced by each side and neither suffers from any apparent defects, the court may in place of weighing the evidence, rely upon the burden of proof and rule in favor of the Bureau. Where a party presents a witness to express value, the least favorable figure set by his witness will be taken as an admission against interest, which is difficult to overcome by other opinion testimony. Evidence of actual sales may be introduced to impeach opinion testimony as to values with the nearness or remoteness of the date of sale as well as the similarity or dissimilarity of the property affecting its weight. The Tax Court must set some definite value based on the evidence. But it may necessarily be any specific value set by opinion or other evidence. The court may select its own specific figure within a range established by the evidence. (Address: Utah Law Review, Salt Lake City, Utah; price for a single copy: $1.50.)

Review of Recent Supreme Court Decisions

George Rossman
Editor-in-Charge

BANKRUPTCY

Notice to Debtors of Reorganized Railroad Held To Be Insufficient

■ *City of New York* v. *New York, New Haven and Hartford Railroad Company,* 344 U. S. 293, 97 L. ed. (Advance p. 268), 73 S. Ct. 299, 21 U. S. Law Week 4109. (No. 203, decided January 12, 1953.)

New York City imposed liens on specific parcels of the railroad's real estate for street, sewer and other improvements. This was in 1931 and before. In 1935, reorganization was begun in the federal district court under Section 77 of the Bankruptcy Act. Notice was sent to mortgage trustees and to all creditors that appeared in court, but other creditors had to depend for their notice on two once-a-week publications in five daily newspapers, only one of which was in New York City. The City received no copy of the order and did not file its lien claims. The court's final decree provided for transfer of the old railroad's property to the newly organized company free of the liens. The railroad brought this action, seeking a declaration that the liens were forever barred, void and unenforcible, and that the real property was discharged and released therefrom. The district court agreed and enjoined enforcement of the liens; the Court of Appeals affirmed, one judge dissenting. On writ of certiorari before the Supreme Court, the Court reversed.

The Court's opinion, delivered by Mr. Justice BLACK, rejected the city's contention that it was not a creditor within the meaning of Section 77, and therefore not required to file its claims in the bankruptcy court. The opinion cited the statutory definition of creditors (". . . all holders of claims of whatever character against the debtor or its property"), and ruled that the fact that the lien claims here were collectible only out of specific parcels of real estate was immaterial.

The judgment of the lower courts was reversed, however, on a holding that the publication of the bar order was not "reasonable notice" to the city. The Court said: "Notice by publication is a poor and sometimes a hopeless substitute for actual service of notice. Its justification is difficult at best. . . . But when the names, interests and addresses of persons are unknown, plain necessity may cause a resort to publication." There was no such excuse here, it was held. It was pointed out that Section 77 (c) (4), which requires the filing of a list of all known creditors, had not been complied with.

It was noted that Mr. Justice FRANKFURTER and Mr. Justice JACKSON doubted whether the City was a creditor within the meaning of the statutory language, but agreed that the notice was insufficient.

The case was argued by Meyer Scheps and Seymour B. Quel for the City, and by Edward R. Brumley for the Railroad.

COMMERCE

Longshoremen's and Harbor Workers' Compensation Act Held To Apply to Railroad Employees Working on Float over Water

■ *Pennsylvania Railroad* v. *O'Rourke,* 344 U. S. 334, 97 L. ed. (Advance p. 262), 73 S. Ct. 302, 21 U. S. Law Week 4106. (No. 60, decided January 12, 1953.)

O'Rourke was employed by petitioner railroad as a "freight brakeman" in its Harismus Cove Yard at Jersey City. He worked as a member of a five-man crew making up trains; their duties included work on the petitioner's car floats that moved freight and passengers from and to the Yard by water. On the night of January 28, 1948, O'Rourke was injured by a fall while working on a float. He brought suit under the Federal Employers' Liability Act, 35 Stat. 65, 45 U.S.C. § 51 *et seq.* The district court granted the railroad's motion to dismiss on the ground that the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, 33 U.S.C. § 901 *et seq.*, applied exclusively. The Court of Appeals reversed on the ground that the Liability Act covered "railroad employees injured while engaged in railroad work on navigable waters" and that respondent was "not employed in maritime employment . . . within the meaning of the Compensation Act".

Mr. Justice REED, speaking for the Supreme Court, held that the Longshoremen's and Harbor Workers' Compensation Act applied. The opinion traced the background of the Harbor Workers' Act and held that that act was exclusive, citing *Nogueira* v. *N.Y., N.H. & H. R.R. Co.*, 281 U. S. 128. The *Nogueira* case involved a railroad employee injured while loading freight cars onto cars located on a moored car float. Respondent sought to distinguish the cases on the facts, contending that his job was "railroading". To this, the Court replied that "The statute applies, by its own terms, to accidents on navigable waters when the employer has any employees engaged in maritime service. . . . Whether the injury occurred to any employee loading freight into cars on the float, as in the *Nogueira* case, or to one like respondent moving loaded cars from a float could make no difference. Both employments are maritime".

Mr. Justice MINTON, joined by the CHIEF JUSTICE, Mr. Justice BLACK and Mr. Justice CLARK, wrote an opinion dissenting on the ground

Reviews in this issue by Rowland L. Young.

that the respondent was a brakeman, engaged in railroading work, and that the fact that his injury occurred over navigable water was immaterial.

The case was argued by John Vance Hewitt for the petitioner, and by Richard C. Machcinski for the respondent.

COMMERCE

Judgment of State Supreme Court Reversed on Ground that Verdict of Jury in Federal Employers' Liability Case Should Not Be Disturbed

■ *Stone* v. *New York, Chicago and St. Louis Railroad,* 344 U. S. 407, 97 L. ed. (Advance p. 304), 73 S. Ct. 358, 21 U. S. Law Week 4130. (No. 320, decided February 2, 1953.)

Petitioner was a member of one of respondent's section crews who injured his back in the course of his employment. He brought this action for damages in the Missouri courts under the Federal Employers' Liability Act, 35 Stat. 65, 45 U.S.C. § 51 *et seq.* The jury returned a verdict for petitioner; the Missouri Supreme Court reversed, holding that he had not made out a submissible case either as to negligence or as to causation.

Mr. Justice DOUGLAS, speaking for the Court, reversed on the ground that the case was peculiarly one for the jury under the facts: Petitioner and another were attempting to remove a tie. The foreman told petitioner to pull harder. He replied that he was pulling as hard as he could. The two made another attempt and petitioner was injured. The tie was finally pulled by four men. The opinion pointed out that the foreman was using only one method of removing ties that day, and that there were three other methods. The Court declared that the issue of negligence and the question of a causal connection was one on which fair-minded men might differ, and that that fact emphasized the importance of leaving the question to the jury.

Mr. Justice FRANKFURTER, joined by Mr. Justice REED and Mr. Justice JACKSON, wrote a dissenting opinion. The dissent rested upon the point that Congress, having left FELA cases to the state courts, had also left the question of submission of cases to the jury to the state courts.

The case was argued by Tyree C. Derrick for the petitioner, and by Lon Hocker for the respondent.

COMMERCE

Award of New York Workmen's Compensation Board Upheld Over Contention that Its Jurisdiction was Barred by Federal Employers' Liability Act

■ *South Buffalo Railway Company* v. *Ahern,* 344 U. S. 367, 97 L. ed. (Advance p. 279), 73 S. Ct. 340, 21 U. S. Law Week 4113. (No. 179, decided January 19, 1953.)

In 1944, Thomas J. Ahern, an employee of petitioner, suffered a coronary occlusion as a result of unusual physical exertion in attempting to "throw a stuck switch". In 1945, Ahern filed a claim with the New York Workmen's Compensation Board, asserting disability caused by injuries sustained in the regular course of his employment. The railroad controverted the claim on the sole grounds that his injuries were not accidental and that his disability was not causally related to the injuries alleged. The Board affirmed a referee's award of compensation to Ahern. The Railroad accepted the order and made bimonthly payments until December, 1948. In January, 1949, Ahern died of his heart condition. At a subsequent hearing to determine a final disability award, the railroad disputed the Board's jurisdiction for the first time, contending that it was engaged in interstate commerce so that the applicability of the Federal Employers' Liability Act deprived the Workmen's Compensation Board of jurisdiction. The Appellate Division upheld the award and the New York Court of Appeals affirmed. Before the Supreme Court, the railroad contended that the New York court's construction of the act unconstitutionally authorized the Board to invade a field foreclosed by federal legislation.

The Court affirmed the judgment of the state courts in an opinion written by Mr. Justice CLARK. The Court did not view the New York court's decision as authorizing the state board to invade a field foreclosed by federal legislation, even though it was admitted that respondent's decedent could have met the "interstate commerce" requirements of the FELA in a suit under that statute. The decision of the state court was read as a holding that New York *"permitted* the Board to render compensatory awards for employees engaged in interstate commerce only if the parties voluntarily had so agreed and 'if there has been no overreaching or fraud' ", and that, in effect, the railroad's conduct over the years estopped it from asserting a flaw in the bargain.

Mr. Justice CLARK's opinion stressed the fact that the FELA displaces any state law trenching on its province, but drew a distinction between coercion, whereby a state compels parties to choose between state and federal remedies, and permission to a state board to "effectuate private agreements by compromising a federal controversy by resort to an impartial local umpire. . . ."

Mr. Justice DOUGLAS wrote a dissenting opinion in which he contended that the supremacy clause barred New York from vesting the state board with jurisdiction and that it could not acquire jurisdiction through consent of the parties.

The case was argued by Albert R. Connelly for appellant, and by Roy Wiederseem for appellee State Workmen's Compensation Board.

CRIMINAL LAW

Conviction Under State Statute Declaring "Every Dissolute Person" To Be a Vagrant Upheld as Resting on Adequate State Grounds

■ *Edelman* v. *California,* 344 U. S. 357, 97 L. ed. (Advance p. 227), 73 S. Ct. 293, 21 U. S. Law Week 4089. (No. 85, decided January 12, 1953.)

Edelman was convicted under a California statute which provides

that "Every . . . dissolute person . . . is a vagrant, and is punishable by a fine of not exceeding five hundred dollars ($500), or by imprisonment in the county jail not exceeding six months, or by both such fine and imprisonment". The conviction was affirmed by the Appellate Department of the Los Angeles County Superior Court. The Supreme Court granted certiorari because of serious constitutional questions raised as to the validity of the statute.

Speaking for the Court, Mr. Justice CLARK held that the question of the validity of the statute, allegedly void for vagueness, was not seasonably presented, since it had not been raised in the state court.

Petitioner also argued that he had been denied equal protection, on the theory that the vagrancy statute was not used by the Los Angeles authorities in all cases to which it might be applied. This argument had been raised below in connection with a subpoena addressed to the local police records section. Since the subpoena had been quashed on the ground that the accompanying affidavit did not comply with the requirements of state law, Mr. Justice CLARK ruled that that question had been disposed of on adequate state grounds.

Petitioner's final contention, that he was deprived of notice and opportunity to have a hearing in the appellate court, was also held to have been settled below on adequate state grounds on the theory that the Appellate Division had denied relief because petitioner sought the wrong remedy under state law. The Court found that, under California law, habeas corpus was the proper way to test the validity of the statute. The writ of certiorari was dismissed as improvidently granted.

It was noted that Mr. Justice JACKSON concurred except that he thought that the availability of habeas corpus from the state courts was immaterial.

Mr. Justice DOUGLAS joined in a dissenting opinion written by Mr. Justice BLACK. In their view, petitioner's constitutional contentions were rejected without his having notice and an opportunity to be heard, and this was a denial of due process.

The case was argued by Emanuel Redfield for the petitioner, and by Philip E. Grey for the respondent.

DECLARATORY JUDGMENTS

Attempt To Secure Declaratory Judgment as to Federal Question for Use in Litigation in State Courts Fails as Inappropriate Under Federal Declaratory Judgment Act

■ *Public Service Commission of Utah* v. *Wycoff Company, Inc.*, 344 U. S. 237, 97 L. ed. (Advance p. 176), 73 S. Ct. 236, 21 U. S. Law Week 4077. (No. 44, decided December 22, 1952.)

Respondent filed this suit in equity in the federal district court seeking (1) a declaratory judgment that its carriage of motion picture film and newsreels between points in Utah constituted interstate commerce, and (2) an injunction against petitioner, the Public Service Commission of Utah, prohibiting the Commission from interfering with such transportation over routes authorized by the Interstate Commerce Commission. The district court dismissed the complaint, holding that the carriage of film between points in Utah was intrastate commerce. The Court of Appeals reversed, and ordered further proceedings to determine "whether the intrastate transportations are nonetheless integral parts of interstate commerce".

Mr. Justice JACKSON, speaking for the Supreme Court, held that respondent was not entitled to relief, on the grounds that there was no threat of irreparable injury to sustain award of an injunction and that the case was not appropriate for a declaratory judgment under the Declaratory Judgment Act of 1934, 28 U. S. C. §2201. After a discussion of the history and purposes of the Declaratory Judgment Act, the opinion observed that the respondent "does not request an adjudication that it has a right to do, or to have, anything in particular. It does not ask a judgment that the Commission is without power to enter any specific order or take any concrete step. It seeks simply to establish that, as presently conducted, respondent's carriage of goods between points within as well as without Utah is all interstate commerce. One naturally asks, so what? To that ultimate question no answer is sought." It was said that the dispute between the parties had not matured to a point "where we can see what, if any, concrete controversy will develop". The opinion stressed the fact that grant of a declaratory judgment here would "preempt and prejudge issues that are committed for initial decision to an administrative body or special tribunal", and pointed out that issuance of a declaratory judgment would amount to an unjustifiable anticipatory judgment by a federal court to frustrate action by a state agency.

Mr. Justice REED wrote a concurring opinion in which he declared that, while he thought that controversy was clear and definite, there was no showing of unusual danger of loss to respondent or that the suit in the state courts could not settle the controversy, and that therefore no federal declaratory judgment should be given.

Mr. Justice DOUGLAS, dissenting, declared that the state was attempting to make respondent obtain a permit to do an interstate business for which it already had a federal permit, and was thus attempting to regulate a field pre-empted by Congress.

The case was argued by Wood R. Worsley for petitioners, and by Harold S. Shertz and Wayne C. Durham for respondent.

LABOR LAW

Computation of Back Pay on Quarterly Basis Upheld

■ *National Labor Relations Board* v. *Seven-Up Bottling Company of Miami, Inc.*, 344 U. S. 344, 97 L. ed. (Advance p. 234), 73 S. Ct. 287, 21 U. S. Law Week 4092. (No. 217, decided January 12, 1953.)

Acting under Section 10 (e) of the Labor Management Relations Act,

the National Labor Relations Board ordered the reinstatement of eleven discriminatorily discharged employees of respondent, with back pay "to be computed upon a quarterly basis in the manner established by the Board in F. W. Woolworth Company". In the *Woolworth* case, the Board had computed back pay on the basis of each quarter of the year from the time of the discriminatory action to a proper offer of reinstatement, the back pay award being determined by deducting from the employee's normal earnings for the quarter the earnings from any other employment during that period. Earnings in one quarter thus had no effect on earnings in another.

The Court of Appeals refused to enforce the order, holding that the Woolworth formula could not be applied against the respondent on the grounds that the employees had not been compensated on a quarterly basis and that there was no sufficient reason so to compute their back pay. The Court of Appeals accordingly modified the order, applying the older Pennsylvania-Greyhound formula, under which back-pay awards were made on the basis of the entire period during which the employee was denied re-employment, rather than on a quarterly basis.

The Supreme Court reversed in an opinion by Mr. Justice FRANKFURTER. It was held that the statute had entrusted the duty of making back-pay awards to the Board "in the exercise of its informed discretion" and that a Board order "should stand unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act". The opinion pointed out that under the Pennsylvania-Greyhound formula, when an employee obtained a better-paying job after his discharge, it was profitable for the original employer to delay an offer of reinstatement as long as possible, since every day the employee put in on the better paying job reduced back pay liability. The Board had adopted the Woolworth formula, it was said, because it felt that that rule adversely affected the companion remedy of reinstatement.

In answer to the contention that there was no evidence in the record to support the order, and that the Board's formula and its reasons for adopting it did not rest on data derived from the instant case, Mr. Justice FRANKFURTER replied that "in devising a remedy, the Board is not confined to the record of a particular proceeding, but may rely upon its 'cumulative experience' ".

Respondent also contended that its business was seasonal, and that a quarterly calculation was unjust because its employees might earn three times as much in the first and fourth quarters as in the second and third. The Court rejected this contention because it was raised for the first time before the Supreme Court. It also refused to accept a suggestion that the pre-Woolworth formula had been frozen into the statute, since Congress, in amending the Wagner Act in 1947, had retained the original language.

Mr. Justice DOUGLAS wrote an opinion dissenting on the ground that use of the Woolworth formula was unfair because of the seasonal nature of the respondent's business.

Mr. Justice MINTON wrote a dissenting opinion in which the CHIEF JUSTICE joined. This opinion held that the Woolworth formula penalized the employer, contrary to the purpose of the statute which was merely to make the employee whole for the injury done by a discriminatory discharge. The old rule, the dissent held, did not fail to make the employee whole, and this was all he was entitled to.

The case was argued by Mozart G. Ratner for petitioners, and by Frank A. Constangy for respondent.

Junior Bar Conference Notice of Elections

■ At the annual meeting of the Junior Bar Conference in Boston, Massachusetts, in August, 1953, there will be elections to the following offices for the following terms:

To serve during the calendar year 1954: National Chairman, National Vice Chairman, National Secretary.

To serve during the calendar years 1954 and 1955: a member of the Executive Council from each of the First, Third, Fifth, Seventh and Ninth Federal Judicial Circuits and the District of Columbia; and a member-at-large from the Fifth and Eighth Circuits.

Nominating petitions may be prepared and submitted for each office and council vacancy, each petition containing the names of at least twenty endorsers. With reference to council vacancies, the endorsers shall be residents of the respective judicial circuit or district as to which the petition is submitted. A petition shall contain a brief biographical sketch of the background and qualifications of the candidate. *A petition, to be considered, shall be submitted to the Chairman of the Junior Bar Conference not later than June 15, 1953.*

The Nominating Committee is forbidden to nominate for the position of Chairman, Vice Chairman or Secretary any person for whom a petition has not been submitted as stated above, except that this prohibition does not apply where no petition has been submitted on behalf of any one in connection with the office in question. If a petition has been submitted on behalf of any one for the position of Chairman, Vice Chairman or Secretary, such person may be nominated by the Nominating Committee for any of such offices or as a member of the council for the particular circuit or district of that candidate.

In the election of officers, the state, territory, or district in which the annual meeting is held shall not be permitted to have more votes counted than the number of votes from whatever other state, territory or district may have the highest number of votes.

The above notice and extracts in substance from the by-laws are submitted for publication in the April and May issues of the AMERICAN BAR ASSOCIATION JOURNAL pursuant to Section 4(a) of Article III of the By-Laws of the Junior Bar Conference of the American Bar Association.

C. BAXTER JONES, JR.,
Secretary
Junior Bar Conference

Courts, Departments and Agencies

George Rossman • EDITOR-IN-CHARGE Richard B. Allen • ASSISTANT

Administrative Law . . . enforcement of agency's subpoena *duces tecum*.

■ Prior to the Administrative Procedure Act, a federal agency was entitled to enforcement of a subpoena *duces tecum* issued in aid of its investigative duties without a prior judicial determination that the party against whom the subpoena ran was engaged in interstate commerce and thus subject to federal statute (*Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186). That Act [5 U.S.C.A. §1005 (c)] provided, however, that such a subpoena would be sustained "to the extent that it is found to be in accordance with law. . . ." Rejecting a contention that this provision of the Act abrogated the former rule, the Court of Appeals for the Fifth Circuit has held that the Act does not suggest "that the duty and burden of determining the question of coverage in the first instance was intended to be shifted from the administrative agency to the courts". To allow an adjudication of coverage in an investigative subpoena enforcement proceeding, the Court said, would result in a "maelstrom of confusion".

(*Tobin* v. *Banks & Rumbaugh*, C. A. 5th, January 14, 1953, Russell, J.)

Bankruptcy . . . mutual set-off.

■ A bankruptcy claimant, who was a building contractor, owed the bankrupt for installation of heating plants and the bankrupt owed claimant for money borrowed. Twice they exchanged checks of the same amounts to apply on each other's accounts. Upon challenge by the trustee that the payment by the bankrupt constituted a preferential treatment of one creditor, the Court of Appeals for the Seventh Circuit held that the transactions were allowable mutual set-offs under §68 (a) of the Bankruptcy Act [11 U.S.C.A. §108(a)] and were not voidable preferences.

(*Matter of Field Heating & Ventilating Co., Inc.*, C. A. 7th, January 22, 1953, Lindley, J.)

Civil Procedure . . . joinder of actions.

■ A personal representative's suit under a survival act for injuries suffered by the decedent prior to his death is for the benefit of the estate, while a personal representative's suit for wrongful death is for the benefit of the next of kin. Consequently, the Supreme Court of Ohio has ruled, the two suits are separate and distinct causes of action, even though grounded on the same factual situation, and the personal representative is a different person in each case. The Court went on to hold, with three judges dissenting in part, that the Ohio statute on joinder requiring that actions to be joined "must affect all the parties to the action" would not permit joinder.

(*Fielder* v. *Ohio Edison Co.*, Sup. Ct.Ohio, December 24, 1952, Hart, J., 109 N.E.2d 855.)

Constitutional Law . . . Regulation of Lobbying Act unconstitutional.

■ The Regulation of Lobbying Act requires all persons who directly or indirectly solicit, collect or receive money to be used principally to aid in passage or defeat of legislation before the Congress, or whose "principal purpose" is "to influence passage or defeat" of legislation, to file quarterly a detailed account of expenditures and contributions. The Act also requires registration of those engaged in such activities. In addition to a fine and imprisonment, the Act provides that those convicted of its violation shall be prohibited for three years from attempting to influence, directly or indirectly, passage or defeat of any proposed legislation or from appearing before a committee of the Congress in support of or in opposition to any proposed legislation.

In March of 1952 a three-judge district court, in *National Association of Manufacturers* v. *McGrath*, 103 F. Supp. 510, held a major portion of the Act unconstitutional because it failed to define the criminal offense with sufficient precision and because the penalty of a three-years' prohibition of attempting to influence legislation violated the right to assemble and petition the government for redress (see 38 A.B.A.J. 407, May, 1952). In the *NAM* case, however, the section requiring registration of lobbyists was found severable and thus escaped. No review of the *NAM* decision was had because the Supreme Court ordered dismissal on the ground that the case had become moot since the defendant against whom an injunction was sought, the Attorney General, resigned before the injunction was entered.

Now the statute has again been attacked in the District Court for the District of Columbia and has again fared badly. In the instant case the Court found that the registration section (which escaped in the *NAM* case) was unconstitutional. The Court held that while the registration section itself might be severed under the separability clause of the statute, the penalty section still ap-

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Editor's Note: Virtually all the material mentioned in the above digests appears in the publications of the West Publishing Company or in The United States Law Week.

plied to its violation, and that the penalty section was bad for the reasons advanced in the *NAM* ruling. The Court further found that the penalty section could not be separated so as to remove the three-year prohibition and retain the fine and imprisonment. It therefore considered the *NAM* case "at least stare decisis, if not res judicata", and dismissed an information for violation of the Act.

(U.S. v. *Harris et al.,* D.C.D.C., January 30, 1953, Holtzoff, J.)

Constitutional Law . . . racial segregation.

■ While the Supreme Court is considering during its current term the question of whether segregation based on race is unconstitutional *per se,* a federal district court has spelled out again the existing rule that segregation is not forbidden if separate, but equal, facilities are provided. The case involved use of three municipal golf courses in Nashville, Tennessee, by Negroes. No final judgment was reached, but the case was left for proof of the segregation and the contentions of the city that it was constructing equal facilities for Negroes.

Writing for the Court, Judge Robert N. Wilkin observed that segregation is a social manifestation which it would be poor policy to attempt to eliminate by judicial decree or legal compulsion when it can be done effectively only "by education and religious inspiration". He said: "During recent years there has been a tendency prompted by overzealous champions of democracy to extend democratic processes and legal procedure into fields where they are not qualified to serve. By burdening democratic and legal processes with obligations which they are not able to meet, they bring democracy and law into disrepute and disintegration." This tendency, he continued, has been incited and increased by both open and covert backers of communism, and others who have unwittingly joined them. "While they may think they are championing freedom and liberalism", Judge Wilkin concluded, "they are bringing about a totalitarianism which will destroy the very object that they seek to serve".

An interesting sidelight of the opinion is the Court's contention that segregation is supported by general principles of natural law.

(Hayes, et al. v. *Crutcher, et al.,* U.S.D.C.M.D.Tenn., November 21, 1952, Wilkin, J., 108 F.Supp. 582.)

Courts . . . recommendations for alleviating calendar congestion.

■ As a means of relieving docket congestion and providing litigants with a prompt and fair adjudication, David W. Peck, Presiding Justice of the Appellate Division of the New York Supreme Court, First Department, has recommended that jury trial be abolished in personal injury actions and that a comparative negligence rule be adopted to replace the contributory negligence doctrine.

Judge Peck pointed out that New York's Supreme Court (first instance in that state) is up-to-date as to all calendars except personal injury suits, and then is lagging only where a jury trial has been demanded. Eighty per cent of the jury trial calendar consists of personal injury suits, he said, and there is a time lag now of forty-four months from filing of suit to trial.

In recommending abolition of jury trial for personal injury suits, Judge Peck declared that if speed of trial were the only advantage he would have less confidence in recommending a change, but he said that he was convinced that the quality of justice would not suffer, and might be better. Speaking of contributory negligence, he said: "It is not just nor is it practical. . . . We know for a fact that few accidents happen without some negligence on the part of both parties. All or nothing, depending upon whether the plaintiff contributes in the slightest to the accident, is hardly a modern concept. Indeed, it could almost be labelled barbaric". He felt that a system of comparative negligence administered by judges would be "fair, just, rational and practical".

(Speech, February 5, 1953, 129 *New York Law Journal* 425, February 6, 1953.)

Criminal Law . . . testimony before congressional committee.

■ Bowers refused to answer several questions when he appeared as a witness before a subcommittee of the Senate Special Committee To Investigate Organized Crime in Interstate Commerce (Kefauver Committee). He was indicted under 2 U.S.C.A. §192 which makes refusal to answer a question "pertinent to the question under inquiry" a misdemeanor. The trial judge instructed the jury that the questions upon which the indictment was based were pertinent and a conviction resulted.

The Court of Appeals for the District of Columbia Circuit reversed, holding that the government had failed to show that the following questions, either standing alone or in context, were pertinent: (1) in what business the defendant was engaged in Chicago in 1927; (2) how the defendant earned $5,000 with which he bought an interest in a restaurant in Florida in 1942; (3) whether the defendant owned an interest in Sunny Isles in Florida and from whom he obtained it; (4) whether a certain person countersigned Sunny Isles checks; (5) whether the defendant knew a certain person alleged to be the president of four dog tracks. Finding that the United States had failed to prove defendant's guilt beyond a reasonable doubt, the Court observed: "We seriously doubt whether the 'Do-you-know-a-certain-person' question, without more, can ever be said to be pertinent for the purposes of a criminal prosecution. . . ."

(Bowers v. *U.S.,* C.A.D.C., February 12, 1953, Wilbur K. Miller, J.)

Damages . . . when punitive damages are allowable.

■ In an action grounded on fraud

for misrepresentation of the size of a lot, the Supreme Court of North Carolina has held that the plaintiffs may recover actual damages (difference between price paid and actual value) but are not entitled to punitive damages in the absence of evidence of insult, indignity, malice, oppression or bad motive other than the same false representations upon which recovery of actual damages was based.

(Swinton et ux. v. *Savoy Realty Co., et al.,* Sup. Ct. N.C., January 6, 1953, Devin, C.J., 73 S.E. 2d 785.)

Equity . . . when equitable powers may be invoked.

▪ Equity will not issue a mandatory injunction to require the performance of a positive act in another jurisdiction, the Court of Appeals for the Tenth Circuit has held in dismissing a complaint asking a federal district court in Colorado to enjoin Louisiana residents to probate an alleged true will and to convey certain real estate. The Court ruled that relief at neither law nor equity may be obtained on account of the destruction or suppression of a will unless it appears that it is impossible to probate the will in the proper probate court, or unless efforts toward such probate have failed.

(McGregor, et al. v. *McGregor,* C. A. 10th, January 2, 1953, Phillips, C.J.)

Evidence . . . exception to hearsay and best evidence rules.

▪ In a condemnation proceeding, where proof is being made of recent sales of similar real estate in the same vicinity, an expert witness' testimony concerning a number of sales of which he has learned in investigation and has verified from examination of land records is not proscribed by either the hearsay or best evidence rules. In recognizing this exception to evidence rules, the Court of Appeals for the Fourth Circuit said that, while such evidence might be excludable because of remoteness of time, it should not be a victim of the hearsay and best evidence rules, since it would "needlessly prolong the trial to require that the sales be proved with the particularity that would be necessary in suits to enforce the contracts relating thereto".

(U.S. v. *5139.5 Acres of Land etc., et al.,* C.A. 4th, December 31, 1952, Parker, C.J., 200 F. 2d 659.)

Husband and Wife . . . married woman's right of action against husband for tort.

▪ The Illinois Married Women's Act provides that "a married woman may, in all cases, sue and be sued without joining her husband with her, to the same extent as if she were unmarried". Construing this statute, the Supreme Court of Illinois, in an opinion examining the basis of the common law rule and reviewing construction of similar statutes in other jurisdictions, has held that the statute abrogates a husband's common-law immunity from tort action by his wife and that a divorced wife may maintain a suit against her former husband for a tortious cause of action arising during the marriage. The Court noted that in such actions the trial court must properly instruct the jury so that expenses for which the husband is already responsible are not computed also as damages.

(Brandi v. *Keller,* Sup.Ct.Ill., November 20, 1952, modified on denial of rehearing January 19, 1953, Bristow, J., 109 N.E. 2d 729.)

Income Tax . . . deductibility of campaign expenses.

▪ In 1944 by a five-to-four decision the Supreme Court ruled that the campaign expenses and party "assessment" paid by an unsuccessful candidate for a state judgeship were not deductible either as expenses of carrying on a "trade or business" or as a loss incurred in a transaction entered into for profit *(McDonald* v. *Commissioner,* 323 U.S. 57).

But if the candidate is successful in being elected are campaign expenses then deductible? The Court of Appeals for the Fourth Circuit has said that the *McDonald* rule controls whether or not the candidate is elected, and has rejected the taxpayer's contention that campaign expenses in such case should be amortized over the term of office and a ratable portion deductible annually.

(Mays v. *Bowers,* C.A. 4th, January 31, 1953, Parker, C.J.)

Insurance . . . denial of insurability to certain classes.

▪ Wisconsin has a statute authorizing the state to issue life insurance and annuities to persons who are within the state or are residents. The state insurance commissioner and his predecessors in office have, however, declined to issue insurance in the State Life Fund to any Negro on the ground that the mortality rate of American Negroes is appreciably higher than that of American white persons. The Supreme Court of Wisconsin has ruled out such a practice by its declaration that applications from Negro residents for insurance in the State Life Fund must be considered and processed in the same manner as applications by white persons and that a Negro whose application, when properly evaluated, discloses a life expectancy equal to that of white persons is entitled to insurance.

(Lange v. *Rancher,* Sup. Ct. Wis., January 6, 1953, Broadfoot, J., 56 N.W. 2d 542.)

Insurance . . . heat exhaustion held accident.

▪ In a case of first impression in the state, the Supreme Court of Ohio has held in a four-to-three decision that a death caused unexpectedly by acute coronary occlusion induced by heat exhaustion or sunstroke is within the coverage of a life and accident policy insuring against "bodily injuries" sustained "through purely accidental means . . . directly and independently of all other causes", and that to warrant recovery it was not necessary that exposure to the sun be accidental.

(*Hammer* v. *Mutual Benefit Health and Accident Association*, Sup. Ct. Ohio, December 24, 1952, Weygandt, C.J., 109 N.E. 2d 649.)

Insurance . . . what is accidental death within meaning of double indemnity clause?

■ The cause of death of an insured under a double indemnity life insurance policy was ruptured veins in the lower portion of the esophagus caused by the insured's exertions in pushing a car in the snow. No autopsy was performed but uncontradicted medical opinion testimony was that a contributing cause of death was cirrhosis of the liver which the insured had suffered for two years and which has a tendency to produce varicose veins in the esophagus.

Affirming the jury's verdict for the plaintiff, the Supreme Court of Oklahoma in a four-to-two decision has held that death under such circumstances was caused by "external, violent and accidental means" within the provisions of the policy. The Court further ruled that medical opinion evidence, even where uncontradicted, is not conclusive, and that the trial court did not err in denying the defendant's motion for a directed verdict and submitting the case to the jury, since such evidence may be disregarded by the jury.

(*New York Life Insurance Co.* v. *Wise*, Sup. Ct. Okla., November 18, 1952, rehearing denied January 6, 1953, Bingaman, J., 251 P. 2d 1058.)

Labor Law . . . reinstatement and reimbursement of employees.

■ Under coercion and a strike threat from the union, the employer discharged several employees for their failure to maintain good standing in the union. The NLRB determined the union-employer security agreement under which the discharges were made invalid and directed the employer to reinstate the discharged employees and further ordered the employer and the union to "jointly and severally" reimburse the aggrieved employees for loss of pay. The employer conceded that both it and the union violated the statute, but contended that the order should have directed the union to make reimbursement since the statute (29 U.S.C.A. §160 (c)) provides that "back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination. . . ."

The holding of the Court of Appeals for the Ninth Circuit was that notwithstanding the fact that it acted under union coercion the employer violated the statute and thus was, along with the union, "responsible for the discrimination".

(*NLRB* v. *Pinkerton's National Detective Agency, Inc., et al.*, C.A. 9th, January 29, 1953, Pope, J.)

Municipal Corporations . . . construction of subway governmental function.

■ The City of Chicago's construction of its subway system has been held to have been an exercise of a governmental rather than proprietary function and the city is therefore immune from liability in a suit for damages and expenses brought by a franchised public utility which was forced to remove and relocate mains and other facilities by reason of the construction. In so ruling, the Supreme Court of Illinois also refused to hold unconstitutional the Chicago ordinance which provided that the utility relocate its facilities at its own expense. The utility had contended that the ordinance impaired its contractual rights under its franchise and authorized a taking of property without just compensation.

(*Peoples Gas Light & Coke Co.* v. *Chicago*, Ill. Sup. Ct., November 20, 1952, rehearing denied January 19, 1953, Fulton, J., 109 N.E. 2d 777.)

Public Records . . . right to inspect.

■ The right of the citizens of a state to inspect documents pertaining to the affairs of the governor's office through the vehicle of mandamus has been clarified by the Arizona Supreme Court. The conclusion reached was that the governor should be given authority to deny in the first instance the right of inspection if he thinks that the document is privileged or confidential, or if he thinks that it would be detrimental to the interests of the state to permit its contents to be known either to newspaper editors or other citizens. The Court declared that under no circumstances was the governor's determination to be final and that such determination rested within the jurisdiction of the courts of the state.

(*Mathews* v. *Pyle*, Sup. Ct. Ariz., December 29, 1952, Phelps, J., 251 P. 2d 893.)

Selective Service . . . right of registrant to make inquiries of draft board.

■ A questionnaire furnished those claiming status as conscientious objectors under the selective service law provides a space for the registrant to sign a statement that in lieu of induction into the Armed Forces and "subject to such regulations as the President may prescribe", he will perform for two years civilian work contributing to the national interest. Instead of signing the statement, the registrant wrote on the form: "First I would like to know what the President will prescribe". The local board did not answer the query.

Under these circumstances the United States District Court for the Western District of Pennsylvania found the registrant not guilty on a criminal charge brought for his refusal to be inducted. The Court said that the law was well-settled that a registrant has a right to appear and discuss his classification with a local draft board, and held that this right would extend to written inquiries submitted to the board. Until the registrant's question was answered, the Court ruled, he had not been afforded a reasonable opportunity to accept or reject the alternatives presented.

(*U.S.* v. *Liberato*, U.S. D.C. W.D. Pa., January 23, 1953, Gourley, J.)

Theaters and Shows . . . liability of operator of athletic arena.

■ Two spectators at a wrestling

match who suddenly found themselves unwilling participants when one of the wrestlers jumped from the ring and attacked them have been unsuccessful in their effort to recover damages from the operator of the wrestling arena. The Court of Appeal of Louisiana for the Second Circuit held that even if the overzealous wrestler were an employee of the oprator his action was outside the scope of his employment and that, while operators of places of amusement are required to protect spectators against reasonably expected hazards, the operator here had no reason to expect that the wrestler would jump from the ring and assault spectators.

(Ramsey, et al, v. *Kallio, et al.,* Ct. App. La. 2d Cir., December 10, 1952, McInnis, J., 62 S. 2d 146.)

Workmen's Compensation . . . "going and coming".

■ In a "going and coming" case decided under Texas law, the Court of Appeals for the Fifth Circuit has held that where the deceased employee, an oil field driller, stopped by an ice house on his way to work to obtain ice for drinking water used at the site of the job by himself and other fellow employees, which practice was a daily custom of the employees known to and acquiesced in by the employer, the employee was acting within the course of his employment and covered by the Texas compensation act.

(Associated Indemnity Corp. v. *Bush,* C.A.5th, February 13, 1953, Strum, J.)

■ In a sort of long-distance "going and coming" case, the New York Court of Appeals was faced with these facts: the deceased employee, science editor of *Newsweek,* obtained permission from his employer to extend his four-week vacation into eight weeks so that he might make an extended automobile trip during which he would combine vacationing with visits to places of scientific interest as background for his work. He was to send back articles during the trip and his employer paid a nominal amount toward expenses of the trip. After visiting Oak Ridge and while enroute to the Southern Research Institute, he stopped at a resort and was killed accidentally as a result of diving into shallow water. The Court, with three judges dissenting, ruled the death did not arise in the course of employment.

(Matter of Davis v. *Newsweek Magazine,* C.A.N.Y., January 15, 1953, Froessel, J.)

Workmen's Compensation . . . when award in one state bars award in another.

■ The Court of Appeals for the District of Columbia Circuit has ruled that the award of maximum benefits under the Maryland workmen's compensation law bars an award in the same case under the workmen's compensation act of the District of Columbia. The covered individual resided in Maryland, the contract of employment was made in the District and the injury occurred in Maryland. In a two-to-one opinion the Court examined the Maryland statute and found that it provided an "exclusive" remedy and that therefore the Maryland award was final and entitled to full faith and credit in the District. The Court distinguished *Industrial Commission* v. *McCartin,* 330 U.S. 622, where an award under the Illinois compensation law did not exclude an award in Wisconsin, on the ground that the Illinois statute does not make itself "exclusive".

(Gasch v. *Britton,* C.A.D.C., February 5, 1953, Proctor, J.)

Further Proceedings in Cases Reported in This Division.

CERTIORARI DENIED, February 9, 1953, by the Supreme Court: *Sig Ellingson & Co.* v. *De Vries*—Agriculture (39 A.B.A.J. 47; January, 1953).

AFFIRMED, February 10, 1953, by the Court of Appeals for the Second Circuit: *Book-of-the-Month Club, Inc.* v. *FTC*—Federal Trade Commission (38 A.B.A.J. 677; August, 1952).

REVERSED, January 15, 1953, by the Court of Appeals of New York: *Matter of Davis* v. *Newsweek Magazine, et al.*—Workmen's Compensation (38 A.B.A.J. 507; June, 1952). See *ante,* this page.

Department of Legislation

Charles B. Nutting, Editor-in-Charge

Congress at Work: A Review

■ To those interested in the legislative process, the recent publication of this book by Stephen K. Bailey and Howard D. Samuel[1] is an event of no little significance. Unlike many texts on political science and government, the work is not a catalogue of the bare bones of a skeleton but rather a description of a living organism. In it the authors give an account of the official activities of the Congress but, more significantly, also bring to light many underlying matters which affect legislative attitudes and output.

The sixteen chapters include a wide variety of subjects. One of the most interesting deals with congressional elections and is made up of three case studies. In the words of the authors: "[T]he three sections . . . attempt to give the reader an insight into three distinct types of congressional elections: a Senator from an area where strong urban forces exist, a Congressman from a one-party, one-crop Southern constituency, and a Congressman from a mixed rural, urban and suburban district."[2] With respect to each, we are given an analysis of the social, economic and political make-up of the district, sources of support for the particular candidate, methods of campaigning and the issues involved. The material seems to have been carefully prepared and is presented in an apparently objective fashion.

Another portion of the work is devoted to "a day in a congressman's office". The three members whose election campaigns were considered also permitted themselves to be followed throughout a typical day by the indefatigable investigators. An account of their experiences should be sufficient to discourage all but the most ardent aspirants for political office. More seriously, the burdensome demands on the time of congressional representatives which make it virtually impossible for them to give adequate attention to legislative matters should be of concern to those interested in the cause of good government.

The problem of congressional mail is also considered in this chapter. Organized pressure campaigns involving the use of the mails have become very common but seem to have little effect since congressmen and their assistants are apparently adept in discovering and discounting letters which appear in large numbers from the same source no matter what devices for concealment may be used. Conversely, letters from individuals, particularly those concerned with particular problems, seem to be carefully considered and handled with reasonable promptness. The character of the issues raised by correspondence varies, of course, with the constituency. For example, Senator Lehman's mail seemed to reflect a much greater emphasis on international problems and broad questions of public policy than did that received by the two members of the House of Representatives.

Although in large legislative bodies the influence of single individuals is ordinarily small unless they occupy high positions in the party hierarchies, there are some outstanding exceptions. One of these was Senator George Norris, of Nebraska, who was largely responsible for the development of the Tennessee Valley Authority. In the chapter entitled "What One Man Can Do" the authors have made an elaborate and detailed study of the legislative history underlying the creation of the Authority, have traced the various moves and countermoves and have indicated the various pressures brought to bear in behalf of the several interests involved. Some highly controversial matter is included and one may perhaps dispute the accuracy of some of the conclusions drawn. However, the story as a whole is a dramatic and fascinating one which may be used as an example of the interplay of powerful forces on the development of a legislative program.

Two other studies are used to illustrate the rapidity and the slowness with which Congress may act. The first, dealing with the Emergency Banking Act of 1933, traces the swift action which was taken in dealing with the economic crisis existing at the time of the first inauguration of Franklin D. Roosevelt. The second describes the skillful and comparatively successful tactics of Senator McCarran in delaying the enactment of amendments to the Displaced Persons Act. As the authors point out, the latter "attempts to describe some of the techniques that are available to a strategically placed legislator intent on stopping or delaying the passage of a bill". Again, one side of the matter is presented with considerable vigor and it is impossible to say whether the treatment is fully objective. It may be said, however, that the account reveals the intricacies of legislative procedure and shows the difficulties involved in securing the enactment of a measure which is opposed by influential forces, regardless of the merits of the particular controversy.

Still another chapter is devoted to an illuminating discussion of lobbying. As the authors point out, lobbying is an essential characteristic of modern democratic government. Viewed in one light, it is nothing more than the exercise of the right of petition. On the other side it may be regarded as an instrument of corruption by which unscrupulous persons seek for themselves unfair advantages over those in less powerful positions. The dilemma of eliminating the worst aspects of lobbying

1. *Congress at Work*, Henry Holt and Company, New York, 1952.
2. Page 12.

while retaining its advantages is one which has never been satisfactorily resolved. This is due in part to the fact that much lobbying is of a sort which cannot be effectively controlled, since it is an indirect form of pressure which is so amorphous in character that it can scarcely be identified. The more obviously corrupt types of lobbying which formerly were prevalent are no longer generally practiced.

The case study used here for purposes of illustration involves the Rent Control Act of 1949. The activities of the National Association of Real Estate Boards are described with particular emphasis on the endeavor to arouse grass roots support through the distribution of newspaper advertisements, the organization of speakers' bureaus and the use of similar devices. Apparently the result was a flood of letters to members of Congress which seems to have had some effect upon the legislators. A counter lobby largely under the direction of the Congress of Industrial Organizations was also in evidence. In addition, administration forces in the Office of the Housing Expediter testified before the committee considering the bill and furnished friendly congressmen with material to use in defense of the measure.

Various other aspects of the activities of Congress are also covered in the book. They include such matters as congressional investigations, private bills, the handling of appropriation measures and the Taft-Hartley Act. The same case study technique is used in each case and the result is an informative picture.

The chief significance of the work under consideration is that it attempts to deal concretely with actual experiences rather than to give an abstract account of the powers and functions of Congress. Although it is not a book which will be of direct assistance to lawyers concerned with legislation it furnishes valuable background material from which many lessons may be learned. In addition, it conveys to the citizen interested in government a sense of the difficulties and inadequacies of the present system and suggests the need for further consideration of the true function of Congress and the means by which its nonessential activities may be reduced or eliminated.

OUR YOUNGER LAWYERS

C. Baxter Jones, Jr., Secretary and Editor-in-Charge, Atlanta, Georgia

Junior Bar Participation in Regional Meetings

by Harold H. Clifford, Director of Organization of the Junior Bar Conference

■ By way of introduction, perhaps it would be best to go into the recent history of regional meetings as it pertains to the part played by the Junior Bar. When regional meetings of the American Bar Association were resumed in 1951, members of the Junior Bar were completely inexperienced in this type of meeting and at a loss as to how best to conduct our part of the program. Those of us who were at that time in the Junior Bar had never participated in meetings of this type and the large majority had never attended any such meetings. We started out at the meetings in Atlanta and Dallas by having members on the Trial Tactics Panel. In addition we attempted to have our own meeting and program patterned after the programs at the annual and mid-year meetings, then closing with some sort of social function. With the exception of the participation in the Trial Tactics Panel, we attempted the same sort of schedule at the regional meeting in Yellowstone Park in 1952.

I should like to add at this time that I happened to be the member of the Executive Council in charge of two of these three regional meetings for the Junior Bar, so any criticisms that I may make in the remainder of this article are not directed at others and any mistakes that were made I not only aided and abetted but actually planned. For the year of 1953, we in the Junior Bar have placed the planning and co-ordination of the Junior Bar participation in regional meetings under the Director of Organization. Possibly on the basis that I have heretofore made my complete quota of errors in organizing regional meetings, our National Chairman, Dick Bowerman, asked me to serve as the Director of Organization.

Let us, now, go back and analyze the meetings in Atlanta, Dallas and Yellowstone. In both the Atlanta and Dallas meetings we found that the participation in the Trial Tactics Panel was very well received. This was true principally because the Trial Tactics Panel was a tremendous success. The social programs at all three of the prior regional meetings were well received and well attended by the younger lawyers.

The business meetings conducted by the Junior Bar, at least at Dallas and Yellowstone, were, in my opinion, as close to a total failure as could be achieved without intent. We had planned to explain to a lot of younger lawyers not familiar with the Junior Bar just what we did in the bar association but our attendance was almost entirely those who were already working on our projects and we did not reach those for whom the program was intended.

We can learn several fundamental principles from these experiences —first, that younger lawyers attending regional meetings do not wish to spend their time at meetings strictly devoted to an organizational theme and that further meetings explaining the organization, the work and the purpose of the Junior Bar cannot compete with simultaneous

educational Section programs. The younger lawyers, many of whom travel a good distance to attend the regional meetings feel that their time and money can best be spent in furthering their education in the particular fields of the law in which they are most interested. Second, that social meetings have a very favorable response and serve a definite purpose in that the younger lawyers have the opportunity to get together, know each other better and form friendships in an atmosphere of good fellowship. And third, that educational parts of the program in co-operation with the senior lawyers of the various other Sections of the American Bar afford an opportunity for the Junior Bar to show all the younger lawyers that they too may become an integral part of the American Bar Asociation and its specialized fields of the law.

In order that we may better schedule our future participation, let us examine the purpose of regional meetings and the purpose of the Junior Bar Conference and see how we may best co-ordinate the Junior Bar work with that of the regional meetings. I have heard many sound and different reasons expressed justifying the continuation of regional meetings and, also, the existence of the Junior Bar. The ones I shall set out are general and do not by any means constitute all the reasons and purposes.

Regional meetings have, basically, two purposes:

1. To interest more members of the Bar in the American Bar Association and

2. To furnish a greater service to those who are already members of the American Bar Asociation by bringing the meetings to them.

The basic purposes of the Junior Bar Conference are:

1. To interest more younger lawyers in bar association work generally and in the American Bar Association in particular, and

2. To afford the younger lawyers in the American Bar Association the opportunity to develop and grow in their profession.

The first purposes of the regional meetings and of the Junior Bar are identical, so the Junior Bar should attempt in future regional meetings to interest more younger lawyers in the American Bar Association by furnishing them the things they want from a bar association. This is undoubtedly, as they have shown by their response at the prior regional meetings, an opportunity to educate themselves further, both generally and in specific fields of the law and also to afford them an opportunity to have the friendships and good fellowship of other lawyers of their approximate age and experience. We can accomplish both purposes of the Junior Bar by co-operating as an organization with the various specialized Sections of the American Bar in their conduct of regional meeting programs. We can do this by jointly sponsoring some of the specialized institute programs and, when possible, having a younger lawyer as a speaker or panel member. In this manner the younger lawyers will be able to increase their education and at the same time observe that active Junior Bar members are gradually achieving stature in the profession and taking their places in their chosen fields of the law through their work in the American Bar Association. This will be of great encouragement to many of the younger lawyers in that they will discover that their efforts in bar association work are both desired and appreciated. It will further show them that as they grow in the profession they have a definite part to play in the development of the standards and education of our profession.

The Junior Bar should continue their social activities at the regional meeting. For it is here in an informal atmosphere that they will have the opportunity to make friends in other communities, friends that are similarly situated in the practice of law, and by obtaining the viewpoints of others consequently broaden their own.

In closing, I should like to mention a little bit about the preliminary plans for the regional meeting in Omaha, April 30, May 1 and May 2. The Junior Bar has been afforded the opportunity to furnish one of the speakers for the Mineral Law Section lectures on the afternoon of April 30 on the subject of oil and gas leases and their pitfalls. On Friday May 1 it is the present plan of the Junior Bar to sponsor a clinic on law office management or medico-legal program in co-operation with the Section of Insurance Law. There are also plans for a cocktail party for the younger lawyers and for sponsoring a dance on Friday evening, May 1, for the entire Bar. In addition, our national chairman has selected the Omaha meeting for a meeting of the national officers and directors of the Junior Bar Conference.

It is our sincere hope that through these means we can increase the number of younger lawyers in the American Bar Association and can better serve those who are already members.

Tax Notes

■ **Prepared by Committee on Publications, Section of Taxation, Harry K. Mansfield, Chairman.**

Sickness Benefits as Tax-Free Compensation

■ Tax rates being what they are, corporate executives have long tried to discover new methods of converting ordinary income into capital gains or to defer the receipt of income until their working days are behind them. The idea of compensation which is completely *tax exempt* is so staggering to the imagination that it is apt to be summarily dismissed as fantastic.

Yet, Section 22 (b) of the Internal Revenue Code grants tax exemption to several types of compensation. Although most of them are very specialized, there is one which might apply to any of the country's fifty-three million taxpayers. Section 22 (b) (5) brings into the select circle "amounts received, through accident or health insurance . . . as compensation for personal injuries or sickness".

Of course, no one will intentionally incur injuries or contract illnesses in order to receive tax-free income. The tensions of modern business, however, are so extreme that many a high-powered executive is forced to spend weeks or months recovering his health. The salaries of such executives invariably continue to be paid during these periods. If at all possible, the employer should certainly take steps to provide that such continued compensation be treated as tax-free to the employee.

Take the case of a man whose salary is $36,000 a year, and who becomes ill for a period of two months. If his salary for those two months can be treated as tax-exempt, he will actually have $3,300 less tax to pay for the year than if he had worked the full twelve months. (This assumes that he is married, and that his outside income equals his deductions and exemptions.) To put it another way, he will be better off, taxwise, than if he had received an $8,000 a year raise.

The Government has recently lost its first attempt to insist upon a strict application of Section 22 (b) (5) by virtue of a decision of the Court of Appeals for the Seventh Circuit in *Epmeier* v. *United States*, 199 F. 2d 508 (7th Cir. 1952).

The taxpayer in the *Epmeier* case was employed by the Lincoln National Life Insurance Company, at a salary of $300 a month. During the first six months of 1945, he was on sick leave and continued to receive the full amount of his salary as a sickness benefit in accordance with the company's established plan as set forth in the "Home Office Manual". The taxpayer had made no contribution to this plan, and in fact the manual referred to the benefits as being "free". The state law did not require the payment of temporary disability payments such as these. The taxpayer claimed that the full $1,800 he received was tax-exempt under the provisions of Section 22 (b) (5). The Court of Appeals agreed with him and reversed the contrary decision of the District Court.

There was nothing gratuitous about the arrangement, the court reasoned. Adequate consideration lay in the agreement of employment, and the use of the word "free" merely meant that sickness benefits were furnished as additional factors of the employee's compensation, free of any money advancement. The assumption of the risk of illness and the indemnity against it constituted just as good a consideration for the contract as a specified cash premium, and the fact that there was no formal contract of insurance was immaterial. There is no legal magic in form, the court pointed out—an observation which the Treasury has made many times when the shoe was on the other foot.

Since the lower court could find no consideration for the contract, it had concluded that the employee could not sue for and recover the sickness benefits if the company refused to pay them, and felt that it was supported in this conclusion by a provision that "the contents of this manual may be changed from time to time as better thoughts occur". The upper court, finding consideration, did not doubt that the employee could have enforced the employer's liability, and looked upon the provision for modification as relating only to possible future changes in the employment contract; "no such modification could reduce the liability for sickness benefits after illness had intervened".

If the *Epmeier* decision is good tax law, it is hard to see how any self-insurance plan for sickness benefits, if sufficiently detailed and communicated to the employees, can fail to qualify as "insurance". This presupposes real insurance against sickness rather than a plan for merely continuing salary payments during time lost through illness.

It is true that the employer in this case happened to be an insurance company, and the court began its discussion by observing that "the employer has statutory authority to engage in the business of insuring risks relating to life and health, and was . . . engaged in writing disability insurance as compensation for personal injuries or sickness". But no further reference was made to the nature of the employer's business, and none of the reasons upon which the court based its conclusion had any bearing on the conduct of an insurance business. Apparently, any kind of employer, through self-insurance, can provide tax-free sickness benefits for his employees.

The Treasury lost no time in taking counteraction. Less than a month after the *Epmeier* case was decided,

it seemingly reversed its previous liberal position with respect to self-insurance under the temporary disability laws of California, New Jersey and New York, and ruled that an employer's self-insured plan under New York and New Jersey law did not constitute a "plan of insurance" within Section 22 (b) (5). "The fact that such plan has been established pursuant to State disability benefits statutes and has been approved by the appropriate State agencies does not transform it into a plan of insurance." I.T. 4107, I.R.B. 1952-23, page 5.

This brusque statement is in sharp contrast to the following language the Treasury had used in I.T. 4015, 1950-1 Cum. Bull. 23, which was "modified" by I.T. 4107, to the extent that the two are inconsistent:

> A voluntary plan, which has been approved by the California Employment Stabilization Commission, constitutes a contract of insurance. Such a plan, adopted under the compulsion of State law, is a contract between the employer and his employees which obligates the employer to pay, and entitles the employees to receive, fixed amounts of compensation for personal injuries or sickness for a fixed period. The employees' rights to receive benefit payments under a voluntary plan in consideration of their employment and the employer's obligation to pay the benefits satisfy the requirements of contract. Furthermore, it seems clear that the contract is one of insurance, as a voluntary plan assures and promises each qualified employee a fixed compensation for a fixed period in the event accident or sickness renders him unable to work. Such assurance is the basic function of an insurance contract. Therefore, such a plan also meets the requirements of Section 22 (b) (5) of the Code.

The judges of the Seventh Circuit would presumably agree with this conclusion and would even extend it to voluntary plans which are adopted without any compulsion of state law. It will probably be some time before the Treasury's reversal of position will be tested, because its new ruling in I.T. 4107 will not be applied to payments received before January 1, 1953.

Meanwhile, there have been reports of a different approach to the problem of providing sick pay through the medium of an acceptable insurance contract. This idea involves the issuance of policies by a bona fide insurance company to provide sickness benefits, but with the premium, paid by the employer, based only on actual disbursements plus a specified percentage. There would seem to be a serious question, despite the nature of the insurer, as to whether such a contract can be regarded as a true insurance contract, since there is no element of risk-taking on the part of the insurance company. The incidence of risk is shifted from the covered employee, it is true, but actually it is shifted to the employer rather than to the designated insurer. The contract would appear to be one of service or agency rather than one of insurance.

Still another solution has been suggested for employers who do not wish to meet the Treasury head-on. This alternative requires the establishment of an employee benefit association to handle the payment of sickness benefits. In this way, with the association qualifying as an insurance company, the employer may indirectly deduct sick pay as a contribution to the association. Furthermore, this type of arrangement offers the inducement of greater flexibility, for the employer may build up the fund through large contributions in profitable years, thereby reducing the strain on his finances in lean years. There are also certain obvious tax advantages in not being held to a fixed commitment year after year.

In a tight labor market, more and more employers are being forced to install fringe benefits. Plans for the payment of sickness benefits are becoming a common feature of present-day employment contracts, and further disputes with the Treasury as to the taxability of such payments seem inevitable. If no efforts are made to persuade Congress to change the statute, there will be many a court battle before lawyers can tell their clients with any degree of assurance whether sick pay is also tax-free pay.

Contributed by committee member William E. Jetter.

Chicago Photographers

Members of the American Bar Foundation who helped to plan the American Bar Center inspect an architect's model of the buildings at the Mid-Year Meeting. Left to right: George Maurice Morris, Chairman of the Finance Committee, David F. Maxwell, Chairman of the House of Delegates, President Robert G. Storey, Allan H. W. Higgins, Chairman of the New Building Committee, Roy E. Willy, Chairman, Committee on Plans, Specifications and Construction.

THE DEVELOPMENT OF INTERNATIONAL LAW

Richard Young • Editor-in-Charge

United States Treaty Developments During 1952

■ During the year 1952, twenty-one international agreements which had been negotiated and signed on behalf of the United States were submitted by the President to the Senate with a view to obtaining its advice and consent to ratification. The subjects covered included some of the most important international commitments entered into by the United States during 1951 and 1952.[1]

Of the twenty-one agreements, fourteen were approved by the Senate and duly ratified by the President. Only six, however, actually entered into force during the year, the delay on the others being due in most cases to slow ratifications by other parties. Among the seven agreements still pending in the Senate are treaties of friendship and commerce with Ethiopia, Denmark and Greece; two instruments relating to the status of forces under the North Atlantic Treaty and the status of officials connected with the North Atlantic Treaty Organization; and two accords of minor importance.

Of the agreements which entered into force, the most prominent was the Treaty of Peace with Japan which became effective on April 28, 1952. Corollary to this major instrument were three defense and security treaties negotiated at the same time: that between the United States and the Philippines (in force August 27, 1952); that between the United States, Australia and New Zealand (in force April 27, 1952); and that between the United States and Japan (in force April 28, 1952). As is well known, these instruments erected in the Pacific area an integrated system of defense of great importance to this country.

A second important group of agreements submitted to the Senate related to the North Atlantic Treaty Organization and the European Defense Community. In addition to the two instruments still before the Senate at the end of the year, the Senate had earlier approved the arrangements for the accession of Greece and Turkey to NATO and a protocol to the North Atlantic Treaty respecting guarantees to be made by the NATO powers to members of the European Defense Community. Associated with this general problem was the important convention on relations with Germany on which action has been completed by the United States but which has not yet entered into force.

Other agreements approved by the Senate covered a wide variety of subjects. These ranged from a "supplementary extradition convention to the supplementary convention of December 13, 1900, between the United States of America and Canada" to a "convention between the United States of America and Finland for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income". Another agreement with Canada dealt with the promotion of safety on the Great Lakes by means of radio. A multilateral protocol was also approved on the subject of prolonging the international agreement of 1937 for the regulation of the production and marketing of sugar.

In addition to the foregoing agreements which were submitted to the Senate in 1952, Senate or executive action was taken during the year on seventeen instruments which had been submitted in earlier years. These included no multilateral instruments of major importance except the 1948 Convention for the Safety of Life at Sea, which entered into force on November 19, 1952. This instrument brings up to date, in the light of recent scientific developments such as radar, the international regulations on this important subject; these had not been revised since the London conference of 1929 on maritime safety.

A special category of instruments consists of conventions drafted at conferences of the International Labor Organization. The constitution of the ILO requires that member states submit these draft texts to their appropriate governmental authorities for action, if any seems necessary. This obligation, which does not require a draft convention to be implemented by any member state without further consideration, has been discharged regularly by the United States by the submission of the texts to both houses of Congress. Most of the conventions proposed have not been found well adapted in form to American conditions, and they are sometimes below American standards. A number, however, have been adopted in the maritime field. Thus in 1952 four ILO conventions dealing with such matters as the certification of able seamen and ships' cooks, the medical examination of seafarers, and food and catering for ships' crews were approved by the Senate. Another convention, concerning labor clauses in public contracts, is pending before the Senate and the House and is of the type less likely to receive approval.

A number of agreements signed on behalf of the United States in late 1951 or 1952 have not yet been submitted to the Senate by the executive branch. Two of the most important of these are the International Plant Protection Convention signed at Rome on December 6, 1951, and the Universal Copyright Convention signed at Geneva on September 6, 1952. The latter instrument represents an effort to formulate standard measures for international copyright

1. A convenient list of the instruments here discussed, compiled in the Office of the Legal Adviser of the Department of State, is given in the 1952 Report of the Committee on International Law of the New York State Bar Association (William Ray Vallance, Chairman).

protection that will be acceptable to the United States, which has never found it possible to join the existing International Copyright Union. If generally adopted, the new convention will bring American practice into harmony with that of other states and will ease the difficulties of securing adequate international protection for literary and artistic property.

Executive Agreements

In addition to treaties and conventions submitted to the Senate for its advice and consent, a substantial number of executive agreements were concluded during the year. A large part of these were made pursuant to statutory authority or in accordance with general policy previously approved by Congress. Thus seven military assistance agreements were signed, all with Latin American countries. "Point Four" general agreements for technical co-operation which were signed with El Salvador and Libya followed the established pattern for such instruments. The same was true of three agreements with Finland, Western Germany and the Union of South Africa, providing for education exchange programs under the Fulbright Act. Ten agreements, the largest group on any one subject, were made with various Western European countries for the purpose of relieving from local taxation expenditures made by the United States Government for the common defense.

One interesting agreement between the United States and the United Kingdom was signed at Washington on January 15, 1952. This extended the area of the so-called Bahamas Long-Range Proving Ground for guided missiles, which had been created by an earlier agreement between the two governments signed on July 21, 1950.[2] Subsequent to the 1950 agreement, the United States and the United Kingdom entered into arrangements on November 26, 1951, with the Dominican Republic under which the Dominican Republic agreed to provide additional facilities along its northeastern coast for the operation of the proving ground. With the signing of the latest agreement, the area allowed for this purpose is now very large, extending from the vicinity of Palm Beach, Florida, to the vicinity of the Turks and Caicos Islands. Since the eastern coast of the Dominican Republic faces Puerto Rico, still further room for expansion is presumably available without the necessity of additional international arrangements.

Publication of Treaties

A recent announcement by the Department of State envisages the elimination of treaties and other international agreements from future volumes of the Statutes at Large. It is proposed instead to establish a new series, entitled *United States Treaties and Other International Agreements*, which will constitute the official published text. Volumes are to be published for each calendar year. The official reason for the change is the transfer of responsibility for printing the Statutes at Large (excluding treaties) from the Department of State to the General Services Administration.

2. For a description of this earlier agreement, see this column in 37 A.B.A.J. 303, April, 1951.

Make Your Hotel Reservations Now!

1953 Annual Meeting

Boston, Massachusetts,
August 23-28, 1953.
Headquarters—Hotel Statler
(All space now exhausted.)

The Seventy-Sixth Annual Meeting of the American Bar Association will be held in Boston, August 23 to 28, 1953. Further information with respect to the schedule of meetings will be published in forthcoming issues of the *Journal*.

Attention is called to the fact that many interesting and worthwhile events of the Meeting will be arranged, as usual, to take place on Saturday and Sunday, August 22 and 23, preceding the opening sessions of the Assembly and House of Delegates, August 24.

Requests for hotel reservations should be addressed to the Reservation Department, American Bar Association, 1140 North Dearborn Street, Chicago 10, Illinois, and should be accompanied by payment of $10.00 registration fee for *each lawyer* for whom reservation is requested. Be sure to indicate *three* choices of hotels, and give us your definite date of arrival, as well as probable departure date.

Reservations will be confirmed approximately ninety days before the Meeting convenes.

More detailed announcement with respect to the making of hotel reservations may be found in the January issue of the *Journal*, page 10. In addition to the hotels listed therein, we have also secured accommodations at Hotels Touraine and Shelton.

Activities of Sections and Committees

SECTION OF ADMINISTRATIVE LAW

■ As a result of the decision of the Section during the San Francisco meeting to disapprove S. 2293 of the 82d Congress in the form in which it then appeared and in accordance with the direction to the Section's Committee on a Code of Conduct for Government Employees, a report has now been submitted for the Committee which in pertinent part states:

(1) The Committee does not believe that the Administrative Procedure Act is an appropriate vehicle for incorporating a code for official conduct of officers and employees in the executive branch of the government as proposed by S. 2293 introduced by Senator Humphrey in the 82nd Congress.

(2) The Committee appreciates, however, that the problem of ethical conduct of elective and appointive officials, officers, and employees of the federal government is a serious one. This problem is beyond the scope of permissible action of the Section of Administrative Law of the Association. If the American Bar Association is to take a position with respect to this problem, it should do so through a special committee appointed by the President of the Association for that purpose.

(3) The question of whether, and to what extent, laws of the federal government should be strengthened to prevent violations of the public trust by officials, officers, and employees of the government in the future, and to prevent persons who deal with such government personnel from endeavoring to influence or corrupt them, requires a careful study of the problem itself, of existing laws, and of the methods of law enforcement now available.

(4) Such study of this problem should be undertaken by a special commission authorized by joint resolutions of both houses of Congress. The members of the commission should be selected on a nonpartisan and representative basis and most of them should not be officeholders. The commission should be provided with counsel and should have powers adequate to its mission.

At the Mid-Year Meeting, the House of Delegates adopted resolutions sponsored by the Section which disapproved S. 2293 in the form in which it was introduced and approved the appointment of a commission to study the problem. (See the account of the proceedings of the House at the Mid-Year Meeting in this issue at page 341).

The question discussed at the annual meeting in San Francisco of whether the Association should authorize an appearance *amicus curiae* in supporting review of the decision of the Court of Customs and Patents Appeals by the Supreme Court of the United States for the purpose of reversing the judgment below in the case of *T. M. Duche* v. *United States*, T.D. May 1, 1952, Vol. 87, No. 18, has now become moot. The Supreme Court of the United States denied certiorari in October, 1952. In view of this there seems to be no further step to be taken by the Section on this matter.

COMMITTEE ON UNAUTHORIZED PRACTICE OF THE LAW

■ Frequently questions are received by this Committee as to whether unauthorized practice of the law is or is not involved in a particular situation and a word or two of information on the literature of the subject and references to cases should be of interest to the Bar generally.

The most recent publication on the subject is "A Study of Unauthorized Practice of Law" by Edwin M. Otterbourg, of New York. This was prepared for the Survey of the Legal Profession and was published by the *Unauthorized Practice News*, a quarterly bulletin of this Committee. Mr. Otterbourg is now President of the New York County Lawyers Association and has been very active in the fight against unauthorized practice of the law since 1913, both as a member and former chairman of this Committee and as a member of the New York State Bar Association Committee. Copies of his study may be obtained at the American Bar Association Headquarters for $2.00.

Unauthorized Practice Decisions, an 838-page bound volume by George E. Brand, of Detroit, was published by the Detroit Bar Association in 1937. A few copies of this fine source book are still available at that Association's headquarters for $2.75.

The most complete and up-to-date digest of cases to be found anywhere in any one volume is in Volume 33, *Words and Phrases*. (West Publishing Company) under the title "Practice of Law". One of the commendable features of this work is that it is constantly kept up to date by cumulative annual pocket parts. Any lawyer who is willing to spend thirty minutes reading this digest of cases will have a good working knowledge of the case law on the subject.

For more detailed digests of particular phases of the subject the following A.L.R. annotations are recommended:

What amounts to practice of law: 111 ALR 19, 125 ALR 1173, 151 ALR 781

Right of corporation to perform or hold itself out as ready to perform functions in the nature of legal services: 73 ALR 1327, 105 ALR 1364, 157 ALR 282

Services in connection with tax matters as practice of law: 9 ALR (2d) 787

Making collections as practice of law: 84 ALR 749, 157 ALR 522

Practicing medicine, dentistry or law through radio broadcasting stations, newspapers or magazines: 114 ALR 1506

Services incident to membership in automobile "association" as practice of law or as ground for discipline of attorney who conducts the "association" or is connected therewith: 106 ALR 548

Practicing or pretending to practice law without authority as contempt:

36 ALR 533, 100 ALR 226
Jurisdiction to enjoin an act (such as practice of law) amounting to a crime: 40 ALR 1145, 91 ALR 315
Right to enjoin practice of profession or conduct of business without a permit: 81 ALR 292
Injunction as proper remedy to prevent unlicensed practice of law: 94 ALR 359
Heir-hunting as practice of law: 171 ALR 351
See also cases cited in Fifth Decennial Digest and supplements under "Attorney and Client", Key No. 11, and 7 C.J.S. "Attorney and Client", §3g, "Practice of Law". The footnotes in C.J.S. list quite a number of cases on acts or services held to constitute the practice of law and on acts and services held not to constitute practice of law.

In 5 Am. Jur. "Attorneys at Law", Sec. 3, "What Constitutes Law Practice", there is a good brief discussion.

There are also many law review articles discussing various phases of the subject but no attempt will be made to list them here. For samples of pleadings and discussions pertaining to recent cases see the quarterly publication of this Committee, *Unauthorized Practice News,* of which Warren Resh is Editor, State Capitol, Madison 2, Wisconsin.

BAR ACTIVITIES

Paul B. DeWitt · Editor-in-Charge

■ At its January Stated Meeting, The Association of the Bar of the City of New York, on the recommendation of its Committee on the Bill of Rights, adopted the following resolution dealing with the representation by lawyers of unpopular causes:

RESOLVED:

1. That The Association of the Bar of the City of New York recognizes that the right to counsel requires public acceptance of the correlative right of a lawyer to represent and defend, in accordance with the standards of the Bar, any client without having imputed to him his client's reputation, views or character.

2. That this Association will support any lawyer against criticism or attack in connection with such representation, when, in its judgment, he has acted in accordance with the standards of the Bar.

3. That this Association will strive to educate the profession and the public on the rights and duties of a lawyer in representing any client, regardless of the unpopularity of either the client or his cause.

At the same meeting a report on the proposed Uniform Commercial Code was presented by William Hugh Peal, Chairman of the Association's Commitee on Uniform State Laws. The Committee recommended, and its recommendation was adopted, that the State of New York make provision for a publicly-financed study of the Code, which would indicate what changes the Code, if enacted, would make in the law of the state. The agency making the study would be directed to hold public hearings, and upon the completion of the study, to report as to whether or not the Code should be enacted.

■ In November the Colorado Supreme Court adopted a number of amendments to the Rules of Civil Procedure which make radical changes in the rules relating to procedure in the Supreme Court. These amendments, together with other amendments adopted by the Court during the preceding year, make the following principal changes in procedure in the Supreme Court:

1. They reduce from twelve months to three months after the entry of judgment the time within which a writ of error may be issued.

2. They eliminate specifications of points and provide that in lieu thereof each party in his brief in his summary of the argument shall state clearly and briefly the grounds upon which he relies.

3. They eliminate the separate and particular statement of each point intended to be urged with appropriate references to the specification of points. The summary of the argument will perform its function.

4. They eliminate abstracts of record and provide that their place is to be taken by a concise statement of the case in the brief of plaintiff in error or in an appendix thereto and, where required, by a supplemental statement of the case in the brief of defendent in error or in an appendix to it.

5. They require that, if previous extensions of time have been granted, a motion for further extension shall contain a statement setting forth all previous extensions and on whose application they were granted and they require that ten copies of each motion or other paper that is not printed is to be filed.

6. They permit any brief of thirty-five pages or less, double-spaced, including any appendix, whether filed separately or not, to be typewritten or mimeographed or reproduced in some other method approved by the Clerk, instead of being printed.

7. They give similar permission for petitions for rehearing to be typewritten or otherwise reproduced. But they further provide that petitions for rehearing shall not contain more than three pages without consent of the Court.

■ Fifty-two Oregon lawyers responded to the call for volunteers to serve as legislative counsel during the 1953 session of the state legislature, according to Herbert Hardy, Portland, Chairman of the Special Committee named by the State Bar to recruit manpower for the Bar's new public service enterprise.

The small number of lawyers in the 1953 House and Senate, which apparently made it necessary to con-

solidate some committees, stimulated the Bar in its program of affording competent legal assistance to the members of the legislature.

Those who served in this capacity, either upon call or upon a rotation plan of residence at Salem, were available for the benefit of the legislators and were not interested in the Bar's legislative program. The legislative program was handled by the Bar's Committee on Legislation, headed by W. H. Masters, Portland.

In selecting lawyers for the new service, Mr. Hardy pointed out that an effort was made to select those who were not directly interested in legislation which was expected to come before the 1953 session, and, especially, none were selected to serve who were in Salem in connection with the interest of clients.

Arrangements were made through Eugene E. Marsh, McMinnville, who was President of the Senate, and Rudie Wilhelm, Portland, Speaker Designate of the House, for an office in the capitol building, where a lawyer was on duty at all times.

David C. PENCE

■ David C. Pence, of Pontiac, was elected President of the State Bar of Michigan for the 1953 term at the Annual Meeting held in Detroit, and was presented a gavel by the retiring President, Lester P. Dodd. Mr. Pence becomes the eighteenth President of the Association. He has served as President of the Oakland County Bar Association and has been a member of the Grievance Committee of the Seventeenth District of the State Bar for several years. He is now serving his sixth year as Commissioner of the State Bar of Michigan.

Also elected at the Annual Meeting were the officers of the first Michigan Conference of Bar Presidents, which residents of local bar associations attended in conjunction with the Annual Meeting. Those elected were William A. Groening, Jr., of Midland, Chairman; Oliver O. Clagett, of Battle Creek, First Vice Chairman; Frederick McGraw of Detroit, Second Vice Chairman; Archie G. Leonard, of Pontiac, Secretary; and Lewis R. Williams, Jr., of Paw Paw, Treasurer.

■ Members of the New Rochelle, New York, Bar Association were recently guests at a seminar on "Good Relations With Your Public", presented by the First Westchester National Bank of New Rochelle. The seminar, open to lawyers, accountants, life underwriters, investigation advisers, banks and trust men, was devoted to methods of increasing public respect for these professions.

Views of Our Readers

■ Members of our Association are invited to submit short communications expressing their opinions, or giving information, as to any matter appearing in the *Journal* or otherwise within the province of our Association. Statements which do not exceed 300 words will be most suitable. The Board of Editors reserves the selection of communications which it will publish and may reject because of length. The Board is not responsible for matters stated or views expressed in any communication.

Dean Griswold and Accounting

■ After admitting that a credit to the inventory account is required when goods are removed from inventory, Dean Griswold stated [in his reply to Mr. Roehner's book review in the January issue, page 41]: "But I was not writing an accounting article. I was writing a legal article, in a legal periodical." To this accounting educator such a defense seems incredible, to say the very least.

No accountant, writing in an accounting periodical, would claim that merchandise *held* on consignment should be included in inventory. Why? Because *legally* the mere physical possession of goods does not constitute holding title thereto. However, acceptance of Dean Griswold's defense not only would make such a comment permissible but also would open up new vistas for writers of accounting articles—accounting contrary to law!

Finally, with respect to the credit to inventory, Dean Griswold concluded: "Nor am I sure that this has always been done in the case of corporate gifts of inventory property". No doubt that statement is correct. However, the fact remains that such a credit always *should* have been made to conform to proper accounting procedure.

EDWARD J. SCHMIDLEIN, JR.
Canisius College
Buffalo, New York

Another View of Accounting Problem

■ In re "Accounting for Lawyers", book review and correspondence at pages 40 and 41 of the January, 1953, JOURNAL:

The point made by Mr. Roehner cannot be stressed too often or too strongly: The need for teaching to lawyers the fundamentals of accounting through a strictly practical approach designed to supply the needs of the lawyer in the use of accounting in his practice. That theme was developed for the lawyers of Iowa at the Iowa tax school in December, 1952, where the fallacies of the Harvard-Yale-Chicago methods were exposed. Actually, the imperious need

of the practicing lawyer in this field is "bookkeeping, plus".

Mr. Roehner, in discussing the issue of donated merchandise, suggests: ". . . the inventory account is credited, and that therefore the cost of sales is reduced by the cost of the material taken out of inventory". Accountants will challenge that conclusion quite as much as the converse conclusion that he challenges; if not squarely incorrect, it is at least ambiguous and misleading. To donate merchandise to charity does not increase the cost of sales, as Mr. Roehner correctly instructs us. Neither does it decrease the cost of sales. The true answer is that it does not affect the cost of sales at all.

All of which proves yet more the crying need for basic bookkeeping learning rather than philosophical refinements of accounting theory.

LOUIS S. GOLDBERG
Sioux City, Iowa

A Bill of Particulars on "Witch-Hunts"?

■ Reference is made to the article entitled "Ancient Vision and Modern Yardstick: The Worth of the Individual", appearing in the January, 1953, issue of the JOURNAL. On page 83 the following statement appears:

> We have condoned by our silence modern witch-hunts for scapegoats, and have uttered faint protest while men were smeared with a "guilt of association" as primitive and unjust as the ancient "blood-guilt" concept which punished babes for the crime of the father.

In view of the fact that the term "witch-hunts" is, in its present usage, of Communist origin, and in view of the fact that the phrase "smeared with a guilt of association" is typical party line jargon, I suggest that a bill of particulars be set forth by the author so that the AMERICAN BAR ASSOCIATION JOURNAL cannot be cited by subversives as authority for the proposition that they should not be exposed and removed from sensitive positions.

To do less would militate against the outstanding contribution to Americanism which our Association has made in preparing its "Brief on Communism: Marxism–Leninism–Its Aims, Purposes, Objectives and Practices".

JOHN B. COMAN
New York, New York

Likes Ballantine Article

■ The article "Serpent in the Garden" [by Arthur A. Ballantine, page 76 in the January number of the AMERICAN BAR ASSOCIATION JOURNAL,] was the best and most effective statement that I have seen bringing out the one-sidedness of the constitutional decisions of the Supreme Court in recent years. What [he has] written deserves the widest circulation.

In connection with what [he has] written, I call your attention to the Supreme Court's decision in the *Los Angeles Times* case, 314 U. S. 252. The courts of California were there reversed for holding a newspaper in contempt for threatening a judge with political extinction if he granted probation in a pending criminal case. My recollection is that not a word was said of all the words that were written in the opinions about the right of the defendant to a trial undisturbed by the interjection of outside influence. In other words, the Justices were so eager in developing the new thesis that newspapers can say whatever they please about pending court proceedings, it occurred to not one of them that there was a defendant who had constitutional rights also.

CLAUDE MCCOLLOCH
United States District Court
Portland, Oregon

The Dangers of a New Convention

■ As a member of the American Bar Association, I receive regularly the AMERICAN BAR ASSOCIATION JOURNAL which I read with varying degrees of regularity depending upon the time I can spare from my work. However, I hold it in the high esteem it deserves as a truly great publication, and am always impressed by the devotion to the profession of those who contribute articles to it. It patently represents a tremendous amount of gratuitous labor.

The article by William Logan Martin, beginning on page 21 of the January, 1953, number, I read with the fascination that is engendered in one as he is witnessing a stark tragedy being convincingly enacted. Not only is this article a scholarly effort showing great study and research, but it leaves no doubt in any reader's mind of the tragic potentiality involved in a constitutional convention under Article V of the Constitution of the United States.

Since you no doubt have read the article, I will not comment upon it, except to refer to the fact, as he points out, that twenty-eight states have already adopted a resolution calling on Congress to call a convention, and that all the other states (except three which are included in the twenty-eight) meet in 1953, that is, their legislatures are convened in that year in accordance with their respective laws.

I confess to an inexcusable ignorance of what has transpired in relation to this proposed convention and as to the dangerous potentialities with which it is charged. I suspect this ignorance is shared by a large segment, if not most, of the members of the state legislatures. Certainly they should understand the effects of adopting the resolution for Congress to call a convention before they vote on it.

I know of no better way to bring this home to them than for the American Bar Association to have Mr. Martin's article reprinted in convenient form and mailed, at the expense of the association, to every member of the state legislatures including the twenty-eight states which have adopted the resolution, and to the governor and lieutenant governor of every state. . . .

I am contacting the governor and lieutenant governor of Pennsylvania to urge them to make our legislature aware of the dangers of this proposed convention and prevent the adoption of the resolution.

J. BURNETT HOLLAND
Orphans Court of Montgomery County
Norristown, Pennsylvania

Proceedings of the House of Delegates:

Mid-Year Meeting, 1953

■ This month, in accordance with our custom, we publish a complete summary of the proceedings of the House of Delegates at the 1953 Mid-Year Meeting, held in Chicago on February 23 and 24. At the first of three sessions, the House heard the reports of the Committees on Scope and Correlation and Retirement Benefits for Lawyers, and the Junior Bar Conference, and began debate on a proposal to amend Canon 46, sponsored by the Committee on Professional Ethics and Grievances.

DAVID F. MAXWELL
Chairman, House of Delegates

FIRST SESSION

■ The House of Delegates of the American Bar Association convened at the Edgewater Beach Hotel, Chicago, Illinois, at 10:00 A.M., February 23, for the first session of the 1953 Mid-Year Meeting. David F. Maxwell, of Pennsylvania, Chairman of the House, presided.

The House stood in silent tribute to Charles Ruzicka, of Maryland, and Austin F. Canfield, of the District of Columbia, members of the House who had died since its last meeting.

As the first business on its calendar the House heard the report of President Robert G. Storey, of Texas. Mr. Storey announced the appointment of two new Committees authorized by the Board of Governors. Loyd Wright, of California, is Chairman of the Lawyers' Indemnity Committee, created to study the question whether it is feasible and desirable for the Association and other bar associations to create a fund to indemnify the occasional client who suffers from an embezzlement by a lawyer. Laird Bell, of Illinois, is Chairman of the Committee on Continuing and Specialized Legal Education, appointed to examine the entire question of continuing education of the Bar and to consider whether qualifications should be set up for specialized fields. Mr. Storey called attention to the Regional Meetings to be held at Omaha April 30-May 2, and at Richmond May 4-6. He brought the members of the House up to date on progress toward the building of the American Bar Center, predicting that by July 1 a contract will have been let for the construction of the Center and the ground broken for the Administration Building. Mr. Storey concluded his report by announcing some of the arrangements for the 1953 Annual Meeting, scheduled for Boston in August.

Harold H. Bredell, of Indiana, gave the Treasurer's report, which showed that last year's dues increase had been accomplished without any net loss of members, and had increased the Association's income by about $164,000 annually. He cautioned the House against any great optimism over this increase, pointing out that expenses were still rising and that expanded operations were necessary.

Judge Walter M. Bastian, of the District of Columbia, Chairman of the Budget Committee, said that his Committee had tried to keep the importance of the new Headquarters building in mind throughout the year in allocating funds to the various Sections and Committees. He urged committee Chairmen to economize wherever possible.

The House then heard the report of the Committee on Scope and Correlation of Work, presented by Chairman James L. Shepherd, Jr., of Texas. He proposed a series of resolutions dealing with the general subject of

the Association's work in the field of criminal law administration. The first of these, in the form adopted by the House, reads as follows:

> That there be created a special committee of the Association, consisting of seven members, to be known as the Special Committee on the Administration of Criminal Justice, which committee shall be charged with the duty of submitting to the House of Delegates recommendations with respect to (a) minimum standards of procedure and administration of the criminal law and (b) appropriate means for bringing about the adoption of such standards as shall be approved by the House of Delegates and that the Committee, in its study, shall consider and report upon the desirability of the esablishment of an Institute of Criminal Law Administration.

Mr. Shepherd also moved that the following resolution be adopted, and the two were considered together.

> That, pending the report of such special committee, all recommendations emanating from other committees and sections of the Association which relate to the administration of the criminal law and criminal procedure, be submitted to such special committee for its consideration and report.

Mr. Shepherd said that his Committee felt that a Committee should undertake an over-all study of the subject of criminal law administration, similar to the study of the administration of justice in the civil field conducted by the Vanderbilt Committee.

Arthur J. Freund, of Missouri, Chairman of the Section of Criminal Law, spoke in opposition to the second resolution, declaring that under it the Section of Criminal Law would be nothing but a subsidiary of the new Committee, which would seriously interfere with the Section's work. He moved to have the second resolution deleted.

Walter P. Armstrong, of Tennessee, Judge Bolitha J. Laws, of the District of Columbia, and Carl B. Rix, of Wisconsin, supported Mr. Freund's position.

Mr. Shepherd explained that the Scope and Correlation Committee had proposed the resolution because it had felt that if the House were going to set up a new Committee and give it a broad directive, then the House should look to that Committee. He said that it was merely a procedural matter, and that he did not feel strongly about the resolution.

The House voted to delete the second resolution, and then adopted the first resolution as amended on motion of Harold J. Gallagher, of New York.

The next proposals of the Scope and Correlation Committee were the following, which were adopted without debate:

> That the proposal of the Section of Criminal Law to initiate a research project on most effective methods of using probation be not approved.
>
> That the Special Committee on Convictions and Incarceration of Innocent Persons be not continued.

New Committee To Study Command Control

Mr. Shepherd then moved adoption of the following, which were considered together:

> 1. That the recommendation of the Special Committee on Military Justice, presented at the San Francisco meeting and referred to this Committee, be not approved.
>
> 2. That the Special Committee on Military Justice be continued, with primary responsibilty in this field, its functions to remain as defined by the House of Delegates at the 1949 annual meeting.
>
> 3. That the Special Committee on Military Justice be directed to resurvey the status of military justice in the light of operations under the Military Code, re-evaluate the measures which have been taken and report to the House on policies it should adopt with specific recommendations as to improvements and practical suggestions for correction of such defects as may have been shown by experience to exist in procedures under the Code.

Mr. Shepherd reminded the members of the House that at the San Francisco meeting the Committee on Military Justice had requested broad authority to appear before Congress and to speak for the Association on the subject of military justice, particularly to urge elimination of command control of courts martial. On the other hand, the Section of Criminal Law and its Committee on Military and Naval Justice favored a policy of waiting to see how the new Uniform Code of Military Justice works out. The dispute had been referred to the Committee on Scope and Correlation. Mr. Shepherd said that his Committee had studied the problem and had come to the conclusion that a complete resurvey of the subject was needed to determine to what extent command control had been eliminated under the Code. His recommendation was that the special Committee should re-survey the subject and report its conclusions to the House at the next Annual Meeting.

Franklin Riter, of Utah, urged that the resolutions be adopted, saying that the need for command control and the desire for a fair judicial process in military cases were perhaps incapable of reconciliation, but that the proposed resolutions recognized the need for careful consideration of the problem.

Blakey Helm, of Kentucky, argued against adoption of the resolutions, saying that he was opposed to any withdrawal from the Association's position on command control.

Mr. Shepherd, summing up for the Committee, said that in the past there had been two agencies dealing with the problem, one urging an immediate change in the Code, the other favoring a delay.

Joseph W. Henderson expressed the hope the House would not reject the work of the Committee on Court-Martial Procedure which fought against command control in seeking amendments to the Articles of War following World War II.

The House then voted to adopt the resolutions.

The last recommendation of the Committee on Scope and Correlation was this:

> That no Special Committee be created to make a survey with respect to regulations and statutes relating to procurement of material and facilities by the Armed Forces.

The creation of a Committee to make such a survey was proposed in a resolution referred to the Committee on Scope and Correlation by the Assembly at the Annual Meeting. Mr. Shepherd explained that it had

seemed to his Committee that the subject was outside the scope and the purposes of the Association.

The resolution was adopted without debate.

Concluding his report, Mr. Shepherd recommended that the *pro bono publico* Sections, which have no dues, give consideration to establishing annual dues for their members, even if such dues be nominal. He said that this would strengthen the Sections and give them greater certainty as to their membership.

The House then heard the report of Theodore Voorhees, of Pennsylvania, Chairman of the Committee on Lawyer Referral Service. He proposed two resolutions:

I.

RESOLVED, That the American Bar Association should advocate the establishment of lawyer referral services by bar associations in all cities with population of 100,000 or more and in all counties with population of 200,000 or more.

FURTHER RESOLVED, That consideration should be given to the establishment of such services by all other bar associations in communities where a need for such services may exist.

II.

RESOLVED, That the American Bar Association approves of the practice, heretofore adopted by a number of bar associations and as approved by the Standing Committee on Professional Ethics and Grievances, of publicizing the establishment of such services to the end that their availability will be made known to all persons who might make use of them.

The resolutions were adopted without debate.

Mr. Voorhees' report stressed the important public relations aspects of the work of his Committee as well as the importance of lawyer referral services to the legal profession.

Motion To Reject Social Security Is Tabled

The report of the Committee on Unemployment and Social Security was delivered by Harlan Don Carlos, of Connecticut, a member of the Committee, in the absence of Committee Chairman Allen L. Oliver, of Missouri. The Committee proposed the following resolution:

That the American Bar Association does not favor the inclusion of self-employed lawyers in the Social Security Program on an elective or voluntary basis such as was proposed in the Lodge Bill and is now proposed in the Buckley Bill, H.R. 1803.

Mr. Don Carlos explained that the legislation was discriminatory in lawyers' favor, since it applied only to lawyers and allowed each lawyer to determine whether he should be covered by social security—a privilege not granted anyone else. This was felt to be poor public relations.

The motion to table carried.

John R. Nicholson, of Illinois, reporting for the Committee on Retirement Benefits for Lawyers in the absence of Committee Chairman George Roberts, of New York, brought the members of the House up to date on the status of the Reed-Keough Bills, and urged them to get in touch with their representatives in Congress to urge passage of the proposals. On motion of Richmond C. Coburn, of Missouri, the House voted to support House Bills 10 and 11 (the Reed-Keough Bills) and that the appropriate Committees be authorized to urge their enactment by the Congress. On motion of Edwin M. Otterbourg, of New York, the House had voted to suspend the rules so that action on Mr. Coburn's resolution could be taken without previous reference to the Committee on Draft.

Richard H. Bowerman, of Connecticut, Chairman of the Junior Bar Conference, reported briefly. On his request, the House voted to approve changes in the by-laws of the Conference.

The House then turned to the report of the Committee on Professional Ethics and Grievances, given by Henry S. Drinker, of Pennsylsylvania. Mr. Drinker proposed the following amendment of Canon 46 of the Canons of Professional Ethics:

That Canon 46 of the Canons of Professional Ethics be amended to read:

A lawyer, approved by his state or local bar association as a specialist in a particular branch of the law, may send to lawyers only, and publish in a legal journal, a brief and dignified announcement of his availability to serve other lawyers in connection therewith.

Mr. Drinker said that the Canon as now written is inoperative, because if a lawyer will act with the candor and fairness required by Canon 22, he will never contend that he acts directly and only for other lawyers, since any lawyer will take a case directly from a client. The proposal recognized the existence of a real demand among lawyers to be able to acquaint other members of the profession with the fact that a certain lawyer is competent and has trained himself to conduct cases in a special branch. Mr. Drinker emphasized the point that the proposed amendment would not permit lawyers to solicit for or advertise to clients, but only other lawyers. He observed that local bar associations have urged such an amendment to the Canons, and that in the opinion of the Committee, the Amendment was in the best interests of the Bar.

Secretary Stecher reported that, while the Board of Governors agreed that an amendment was needed, it felt that this proposal was unworkable. In behalf of the Board, he moved that the proposal be referred back to the Committee.

Edwin M. Otterbourg, of New York, spoke strongly in favor of the Board's substitute motion. Mr. Otterbourg pointed out that this was the first use of the word "specialist" in the Canons, and that there was nothing in the proposal to indicate what branches of the law were to be recognized as fields of specialization or what standards were to be used to determine the qualifications of a specialist.

Charles M. Lyman, of Connecticut, also speaking for the referral, declared that the Association should not amend its Canons, which have been adopted by many state and local associations, without giving those associations an opportunity to present their views.

At this point, 12:30 P.M., the House recessed before the close of the debate on Mr. Drinker's resolution.

■ At its second session, the House voted to refer the proposal to amend Canon 46 back to the Committee on Professional Ethics and Grievances, and heard the reports of the following Committees: Customs Law, Traffic Court Program, Public Relations and Income Tax Amendment. It also acted upon resolutions sponsored by the Section of Administrative Law.

SECOND SESSION

■ The House reconvened at 2:00 P.M. and continued its debate on the proposed amendment of Canon 46. Judge Frederic M. Miller, of Iowa, Clifford Gardner, of Minnesota, Bernard G. Segal, of Pennsylvania, Osmer C. Fitts, of Vermont, Albert E. Jenner, Jr., of Illinois, and Douglas Hudson, of Kansas, spoke on the question. In general, the speakers agreed that an amendment of the Canon was desirable, but they held that the language offered by the Committee was not satisfactory and that further study of the proposition was needed.

The House voted to refer the resolution back to the Committee for further study and report.

Roy E. Willy, of South Dakota, speaking for the Building Committee, showed diagrams of the proposed floor plans for the new Administration building.

Morris B. Mitchell, of Minnesota, then reported for the Committee on Judicial Selection, Tenure and Compensation, of which he is the Chairman. He spoke briefly on the work of the bar associations in Illinois and New York, and again called attention to the urgent need for increasing judicial salaries. His report called for no action by the House. James D. Fellers, of Oklahoma, urged serious consideration and active backing of the report.

The next item of business was the report of the Committee on Customs Law, delivered by the Committee Chairman, Albert MacC. Barnes, of New York, who offered the following resolution:

> RESOLVED, That the American Bar Association recommends to the House of Representatives that H. R. 1027 be amended by striking out lines 3 to 11 inclusive and inserting in lieu thereof the following:
>
> That on and after the effective date of this act no trade agreement which contains any provisions for reduction of tariff rates shall become effective unless such agreement is filed with the Clerk of the House of Representatives and with the Clerk of the Senate and is approved by a joint resolution within a period of ninety days from such filing.
>
> RESOLVED FURTHER, that the Committee on Customs Law be authorized to advocate the adoption of such amendment before the appropriate committees of Congress.

Mr. Barnes explained that H. R. 1027, as introduced in the Congress, provides that proposed tariff reductions become law after a ninety-day period unless Congress acts to the contrary during that time, and that the purpose of his resolution was to eliminate the negative aspects of tariff reduction, so that Congress would regain its ancient authority over tariff policies.

The House voted to adopt the resolution.

The last resolution of the Committee on Customs Law was as follows:

> That the Committee on Judicial Selection, Tenure and Compensation and the Committee on Customs Law be authorized to advocate the adoption of Senate Bill No. 32, provided it is amended to increase the daily allowances for federal judges from $10 to $20 a day.

Senate Bill 32, as introduced, provides for an increase from $10 to $15, and the original resolution proposed by the Committee merely called for approval of that bill. Their resolution was amended at the suggestion of Loyd Wright, of California, who argued that $15 a day is inadequate and that the Association should not go on record as saying that a federal judge is entitled to only $15 a day for expenses. There was some debate on Mr. Wright's amendment to the resolution, and a motion to table his proposal was defeated. The resolution was finally adopted in the form printed above.

The next report was that of the Committee on Traffic Court Program, given by Raymond N. Caverly, of New York, in the absence of Committee Chairman Albert B. Houghton, of Wisconsin. Mr. Caverly gave a brief oral report that required no action by the House. His report covered eight traffic conferences held during the year and the traffic court surveys now under way in Los Angeles, Hartford, Atlanta, and the State of Arizona.

Thomas L. Sidlo, of Ohio, Chairman of the Committee on Public Relations, delivered a short oral report that required no action.

House Considers New Income Tax Amendment

The report of the Committee on Income Tax Amendment, delivered by Committee Chairman William Logan Martin, of Alabama, recommended the adoption of the following resolution:

> RESOLVED, by the American Bar Association that the Special Committee on the Proposed Amendment to the Constitution of the United States Limiting the Power of Congress to Tax Incomes, Inheritances and Gifts be continued.
>
> RESOLVED FURTHER, that the Special Committee be authorized to undertake to secure the submission by Congress to the states and ratification by the states of an amendment to the Constitution of the United States which will limit the power of Congress to levy and collect taxes on incomes, inheritances and gifts, in substantially the form of the amendment proposed in joint resolutions introduced in the House of Representatives and the Senate of the United States by Congressman Chauncey W. Reed and Senator Dirksen, both of Illinois, on January 9 and 16, 1953, respectively (H.J. Res. 103 and S.J. Res. 23), a copy of which appears in the accompanying Report, or in such other form as will accomplish the basic purposes of such amendment.

Mr. Martin explained that Congressman Reed had proposed a resolution in the 82d Congress which called for a constitutional amendment limiting the power of Congress to tax incomes. The Association,

speaking through its House of Delegates, endorsed that resolution at the 1952 Mid-Year Meeting. The new resolution offered here, Mr. Martin explained, was presented because Mr. Reed and Senator Dirksen have introduced a new measure in the 83d Congress which differs from the proposal endorsed by the Association. Mr. Martin said that the first proposal limited income tax rates to 25 per cent, except that Congress might, by a three-fourths vote, raise the limit to 40 per cent or, in time of war, suspend the limitation entirely. The new proposal fixes the same 25 per cent limitation, but eliminates the war-escape provision and authorizes the Congress, by a three-fourths vote, to change the income tax rate to any percentage, providing that the lowest rate be not more than 15 percentage points lower than the highest.

The House adopted the resolution after extended debate. John C. Satterfield, of Mississippi, A. L. Merrill, of Idaho, Thomas B. Gay, of Virginia, Robert B. Dresser, of Rhode Island, and Frank W. Grinnell, of Massachusetts, spoke in favor of its adoption, while Jefferson B. Fordham, of Pennsylvania, and Douglas Hudson, of Kansas, spoke against adoption.

Ashley Sellers, of Washington, D.C., the Section Delegate from the Section of Administrative Law, had five resolutions to present to the House. The first two of these approved changes in the Articles and By-laws of the Section, and were adopted by the House without debate. They are not printed here in the interests of saving space.

The third recommendation of the Section was the following (as amended at the suggestion of the Board of Governors):

> WHEREAS, the Judicial Conference of the United States proposed in 1951 that the President call a conference of representatives of the administrative agencies, in which representatives of the bar should also participate, for the purpose of considering improvement in administrative procedures, and
>
> WHEREAS, in the opinion of the American Bar Association it is desirable that such a conference be held, and that the Association participate therein;
>
> RESOLVED, That the Section of Administrative Law be authorized to further the calling by the President of a conference of representatives of the administrative agencies and the bar as proposed by the Judicial Conference of the United States, and when such a conference is called to participate therein in behalf of the American Bar Association; provided that the Section be not authorized to advocate any measures without the prior approval of the House or Board of Governors.

Mr. Sellers said that the Judicial Conference of the United States had proposed such a conference of representatives of the administrative agencies in 1951, and that the Section felt that their representatives should participate in such a conference.

The resolution was adopted without debate.

The fourth resolution of the Section contained three clauses, only the first two of which were adopted; the third, labeled (c) below, was referred to the Committee on Scope and Correlation, since it proposed the creation of a new Committee of the Association.

The resolution was as follows:

> RESOLVED, (a) That the American Bar Association disapproves S. 2293, 82d Congress, in the form in which it was introduced.
>
> (b) That the American Bar Association approves in principle, and recommends to the President of the United States and to Congress, the establishment of a commission on ethics in government, empowered to conduct hearings, study applicable laws, make specific recommendations concerning the improvement, and maintenance at a high level, of the moral standards of official conduct of elective and appointive officials, officers and employees of the United States, and
>
> (c) That the House of Delegates authorizes the President of the American Bar Association to appoint a special committee of the Association on Standards of Ethical Conduct for Public Officials for the purpose of supporting legislation providing for the establishment of a commission on ethics in government, and of counseling with any such commission as may be so established.

In explaining these proposals, Mr. Sellers said that several bills have been introduced in Congress to establish a code of conduct for federal employees. S. 2293, 82d Congress, proposes to add a code of ethics to the Administrative Procedure Act. The Section was opposed to that on the grounds that the subject was not germane to and should not be dealt with as part of the Administrative Procedure Act. Mr. Sellers said that the B and C clauses of the resolution would put the Association on record as supporting the purpose of the legislation and create a Committee to formulate specific Association policy on the matter.

The first two clauses were adopted without debate; the third clause was referred to the Committee on Scope and Correlation.

The fifth and last resolution of the Administrative Law Section was as follows:

> RESOLVED, That the Section of Administrative Law be authorized to oppose the enactment of any legislation identical to or substantially similar to H.R. 5941 of the 82d Congress, that bill being one which would provide for the removal of the Federal trial examiners by the Loyalty Board procedure rather than by the procedures contemplated by the Administrative Procedure Act.

Mr. Sellers said that it was admittedly a difficult question whether trial examiners, being federal employees, should be placed in a different position with respect to loyalty proceedings, but that, in view of the fact that one of the basic tenets of the Administrative Procedure Act was to provide an independent administrative judiciary, it was the Section's position that H.R. 5941 jeopardized that principle.

Ross L. Malone, of New Mexico, spoke against this resolution, arguing that the trial examiners were employees of the Government and that a complete revision of the loyalty program was under way which made it advisable to delay action. He moved to refer the resolution back to the Committee. Charles S. Rhyne, of the District of Columbia, John W. Cragun, of the District of Columbia, and Charles B. Nutting, of Pennsyl-

vania, all spoke against Mr. Malone's proposal and in favor of adoption of the resolution.

The House voted to adopt the resolution and then recessed at 5:25 P.M.

■ The third session of the House was perhaps the liveliest of this meeting, and there was extended debate over reception of the report presented by Judge John J. Parker, Section Delegate of the Section of International and Comparative Law. In other fields, the House heard the report of the Section of Taxation, the Committee on Hearings, the Committee on Legal Aid, the Committee on Peace and Law Through United Nations, the Committee on Jurisprudence and Law Reform, the Section of Legal Education and Admissions to the Bar, the Committee on Communist Tactics, Strategy and Objectives and the Committee on Disciplinary Procedures.

THIRD SESSION

■ The House convened for its third and final session at 10:00 A.M. Tuesday, February 24, with Chairman Maxwell presiding.

The report of the Section of Taxation was presented by the Chairman of the Section, Thomas N. Tarleau, of New York. The first eight resolutions proposed by this Section dealt with technical changes in the Internal Revenue Code, all of which were adopted without debate; because of its length the text of the resolutions cannot be published here. The proposals may be summarized as follows:

1. Amending the Code so as to give uniform treatment to all feeder corporations, all of whose income goes to tax-exempt organizations. Under the Revenue Act of 1950, feeder corporations whose income goes to educational and hospital organizations are exempt from taxation for all years prior to 1951.

2. An amendment to the Code so that there will be no taxable transfer resulting from changes in the size of partnership interests. Such a tax was felt to be unnecessary and to complicate changes in partnership interests.

3. An amendment to the provision of the Code imposing stamp taxes upon transfers of securities so as to exempt from tax the alleged transfer by a corporation which is a party to a merger or consolidation to its security holders of the right to receive securities of the continuing corporation. Under present law, a merger of two corporations results in one tax on the issuance of the new securities and a second tax on the right to receive it. It was thought that the imposition of two taxes is unnecessary.

4. An amendment to the Code so as to eliminate the so-called per-country limit from the foreign tax credit provisions (Sections 131 (b) and (j)).

5. An amendment to the Code so as to eliminate the withholding tax on noncash benefits furnished by employers to employees. This was deemed desirable because of the difficulty of valuation and of determining whether noncash benefits actually are income.

6. An amendment to the Code so that the entire amount of a purchase money obligation acquired upon the sale of capital assets will be treated as a capital gain. Under present provisions, the entire amount of such a purchase money obligation is a capital gain unless it is worth less than par, in which case it is argued that it might be treated as ordinary income.

7. An amendment to the excess profits tax provisions of the Code so as to include therein a general provision for the correction of inequities in the excess profits tax. The present provisions are deemed inadequate.

8. A series of amendments to the Code, along the lines suggested by the American Law Institute, revising and clarifying the income tax treatment of partners and partnerships. Under the existing law there are two types of treatment, one based on a theory of co-ownership, the other that the partnership is a single unit.

The Tax Section's next resolution dealt with proposals in Congress to separate the Bureau of Internal Revenue from the Treasury Department, a very difficult question and one that the Section thought should not be acted on by Congress without allowing a full opportunity for deliberation by interested groups. Mr. Tarleau proposed the following resolution on the subject which was duly adopted as amended on motion of Judge Miller, of Iowa:

WHEREAS, there have been introduced H.R. 245 and S. 261, companion bills designed to improve the administration of the Internal Revenue laws; and

WHEREAS, the bills seek to accomplish this objective by separating the Bureau of Internal Revenue from the Treasury Department, making it an independent agency within the executive branch of the Government and vesting in it all administrative and interpretative functions relating to the Internal Revenue laws; by placing the Commissioner of Internal Revenue outside the sphere of direction and control traditionally exercised by the President over executive officers and departments; and by vesting in the Commissioner of Internal Revenue certain functions now vested in the Department of Justice and in the Bureau of Customs; and

WHEREAS, the Officers, Council, and a special Committee of the Tax Section of the American Bar Association have been studying the questions involved in the structure and position of the Bureau of Internal Revenue, and are planning to make a full report on these matters at or before the annual meeting of the Association on August 24, 1953; and

WHEREAS, prior to the completion of such studies, the Association is in a position to express its opinion on only that portion of the bills which would give the Commissioner of Internal Revenue a tenure of office different from that accorded other executive officers;

BE IT RESOLVED, that a determination of the proper structure and position of the Bureau of Internal Revenue involves considerations of great difficulty and importance, that the solutions considered in H.R. 245 and S. 261 involve fundamental changes in our governmental structure, and that accordingly the American Bar Association respectfully recommends to the Congress that no action be

taken upon these bills until after opportunity for deliberation by interested groups and full public discussion.

BE IT FURTHER RESOLVED, that it is the opinion of the American Bar Association that any solution to the problems considered in these bills should not involve placing the Commissioner of Internal Revenue outside the sphere of direction and control traditionally exercised by the President over executive officers and departments, through a fixed term of office or otherwise.

BE IT FURTHER RESOLVED, That the Officers and Council of the Section of Taxation are directed to bring this recommendation to the attention of the proper committees of Congress and to the Executive Branch of the Government.

The House then turned to the report of the Committee on Hearings, given by the Chairman, Osmer C. Fitts, of Vermont. This report dealt with a complaint by a lawyer in Iowa appealing from Opinion 284 of the Committee on Professional Ethics and Grievances, which proscribes use of the words "Tax Law Only" after a lawyer's name in the classified telephone directory. Mr. Fitts said that his Committee had given full consideration to the question and recommended that no action be taken on the complaint, noting that the Council of the Section of Taxation had adopted a resolution proclaiming such a listing in the phone book to be a violation of Canon 27 and expressing opposition to any change in the Canon so as to permit such a listing. The House voted to accept the Committee's recommendation.

The House then listened to the report of the Committee on Legal Aid by Frances Craighead Dwyer, of Georgia, a member of the Committee, including a brief statement on the development of legal aid in that state.

International Law Report Arouses Debate

Perhaps the liveliest debate of the meeting was touched off by the report of the Section of International and Comparative Law, given by Judge John J. Parker, of North Carolina. Judge Parker's report, which called for no action by the House, dealt with the Bricker proposal to amend the Constitution so as to limit the treaty-making power, and set forth objections to the amendment, saying that it was unnecessary and would hamper and embarrass the conduct of our foreign relations.

Alfred J. Schweppe, of Washington, Chairman of the Committee on Peace and Law Through United Nations, rose to a point of order. He said, "I have examined the By-laws of the Association and I find that the only kind of a report that can be brought before the House of Delegates is a report of the Section. I see nothing there that authorizes a report by the Council of the Section, in the absence of Section action."

Chairman Maxwell ruled that the point of order was not well taken, saying, "the reason for the Chair's ruling is that the report of the Section required no action of this House and contained no recommendations and did not purport in any way to be a statement of the policy of this House."

Frank E. Holman, of Washington, moved that the report be not received, on the ground that it was a reargument of a question which the House had already decided otherwise, and that accepting the report would hamper the efforts of the Committee on Peace and Law Through United Nations, members of which were due to appear before congressional committees to speak for the Association on the subject. Mr. Holman contended that the report was an attack on the policy of the Association, and that the Section was not entitled to a review of the action of the House "under any kind of trick of language or trick of document".

Lyman M. Tondel, Jr., of New York, Chairman of the International Law Section, said, "I have never tried to do anything in this bar association by subterfuge and I am not trying to do anything now. The fact of the matter is that the resolution that is before the Judiciary Subcommittee is S. J. Resolution 1 . . . and it is not discussed in the Peace and Law Report. I don't criticize that a bit. But I do say that when a subject has had this much attention over the past two years by the House of Delegates, there is nothing improper and nothing malignant in the Section's presenting the members of the House with a copy of S. J. Resolution 1 and an analysis of it."

Harrison Tweed, of New York, Blakey Helm, of Kentucky, and Judge Parker spoke against Mr. Holman's motion. They argued that there was nothing improper about the Section's giving its analysis of a proposed constitutional amendment to the House, that the proponents of the Bricker amendment had given the public the impression that the American Bar Association was unanimous in favoring the proposal, and that it was not unusual for a Section or Committee to review Association policy, previously adopted by the House—the report of the Committee on Scope and Correlation proposing a restudy of the command control of courts martial question was cited as a precedent.

Speakers in favor of Mr. Holman's motion, including Frank W. Grinnell, of Massachusetts, W. E. Stanley, of Kansas, Sylvester C. Smith, of New Jersey, Franklin Riter, of Utah, and John C. Satterfield, of Mississippi, argued that the report of the Section was an attempt to undermine a previous action of the House and would nullify the effectiveness of the position taken by the House, and that the principle at stake was whether the House of Delegates should speak for the Association or whether a Section was to be allowed indirectly to convey to the public the impression of division within the ranks of the Association.

James R. Morford, of Delaware, proposed as a compromise that the report of the Section be received with the proviso that nothing contained in it should be construed to be the action of the House of Delegates. This was adopted by the House.

Mr. Schweppe, making the report of the Standing Committee on Peace and Law Through United Nations, said that he had no fundamental objection to the so-called Section report just received insofar as it analyzed S. J. Res. 1, but had thought that those positions of the report which argued generally against the position of the House in its February and September, 1952, resolutions, had seemed to him out of place and only confusing to the press and the public where no action by the House was requested by the Section. He briefly summarized the Committee's February 1, 1953, report on treaties and executive agreements and on the current status of the Draft International Covenant on Human Rights, the proposed International Criminal court, and the proposed Covenants on Freedom of Information and International Right of Correction. He stated that he and members of the Committee had, with approval of the Board of Governors, on February 18 and 19, testified before a subcommittee of the Senate Judiciary Committee on treaties and executive agreements, and had been asked to hold themselves available.

Regional Meeting Committee Reports to the House

E. Smythe Gambrell, of Georgia, reporting as Chairman of the Committee on Regional Meetings, made an oral report which required no action by the House. He stressed the importance of Regional Meetings in bringing the average member of the profession in close touch with the Association, and outlined the plans for the Missouri Valley Regional Meeting, to be held at Omaha April 30-May 2, and the Blue and Gray Regional Meeting, to be held at Richmond May 4-May 6.

Franklin J. Marryott, of Massachusetts, reporting for the Section of Insurance Law, moved that amendments to the Section's by-laws be approved. The House voted approval without debate.

Albert E. Jenner, Jr., of Illinois, Chairman of the Committee on Jurisprudence and Law Reform, proposed a resolution recommending an increase in the jurisdictional amount in diversity of citizenship cases in the federal courts from $3,000 to $10,000. This had been proposed at the 1952 Annual Meeting but had been referred to the Board of Governors. The proposal, based on a recommendation of the Judicial Conference of the United States, was intended to cut down the number of cases in federal courts. It was felt that $3,000, the present figure, adopted in 1911, was no longer a substantial amount and that a comparable figure, in terms of today's purchasing power, would be $7,500.

A. L. Merrill, speaking for the Board of Governors, urged that the resolution be not adopted. The Board felt that there were many places in the country where $3000 is a substantial sum. Furthermore, there are many states that have not adopted the federal rules. Mr. Merrill declared that citizens in those states who want the advantage of the federal procedure should not be denied it merely because of the amount involved.

The motion to adopt the resolution lost.

Whitney North Seymour, of New York, Section Delegate of the Section of Legal Education and Admissions to the Bar, proposed the following resolution for that Section, which was adopted without debate:

> WHEREAS, THE University of Houston School of Law, of Houston, Texas, was given provisional approval by the American Bar Association on September 21, 1950; and
>
> WHEREAS, The University of Tulsa School of Law of Tulsa, Oklahoma, was given provisional approval by the American Bar Association on September 21, 1950; and
>
> WHEREAS, The schools have continued since then and now are in compliance with the Standards of the American Bar Association:
>
> THEREFORE BE IT RESOLVED, That the American Bar Association grants full approval to the Schools of Law of the University of Houston and the University of Tulsa.

Mr. Seymour also presented the report of the Committee on the Federal Judiciary of which he is a member. Mr. Seymour said that the new Attorney General and the new Deputy Attorney General had assured representatives of the Committee that it was their desire to see to it that federal judges of high quality were selected for all the vacancies, and had agreed that the names of candidates being seriously considered would be submitted to the Committee for its opinion. This was an affirmation of a policy agreed to last summer by the Justice Department. Mr. Seymour also reported that the Senate Judiciary Committee had promised to continue to consult the Association's Committee on all questions of confirmation of federal judges. The report called for no action by the House.

Dean Jefferson B. Fordham, of Pennsylvania, gave a brief progress report for the Section of Municipal Law. He mentioned the Section's work with fifteen other national organizations on a study of urban parking problems and its co-operation with the Investment Bankers Association on the matter of municipal finance.

Tracy E. Griffin, of Washington, speaking for the Committee on Communist Tactics, Strategy and Objectives, of which he is a member, reported for that Committee. He presented the following resolution to be acted upon by the House:

> WHEREAS, it has been thoroughly established that International Communism, the Communist Party of the United States and individual Communists aim and plan to overthrow the government of this country and of other countries by force and violence and that communist activities in this country are dominated and dictated by a foreign power; and
>
> WHEREAS, membership in or adherence to the Communist Party of the United States by any attorney is inconsistent with and violates his fundamental oath of office; and
>
> WHEREAS; evidence has been adduced through sworn testimony in Congressional investigations that some attorneys, relatively few in number, have been members of Communist Party cells; and
>
> WHEREAS, some attorneys have, in lawful inquiries into their membership and activities in the Communist

Party, refused to testify on the ground that such testimony would tend to incriminate them; and

WHEREAS, it is the duty of the Bar to cause further inquiry to be made to determine the fitness of such attorneys to continue to practice;

BE IT RESOLVED,

(a) That the Attorney General be requested to review the roster of such attorneys and if he believes the facts warrant to move before any Federal Court to which each of said attorneys may have been admitted, that the Court inquire into his activities and conduct and determine his fitness to continue to practice in such court, and

(b) That the state bar associations or other local associations having jurisdiction be requested to make like inquiry and, where warranted, to institute proceedings to determine his fitness to continue to practice.

The House voted to adopt the resolution without debate.

The Committee on Disciplinary Procedures, in a report presented by Charles Leviton, of Illinois, offered the following resolution which the House adopted:

That the jurisdiction of the committee be enlarged to include the development and submission to the Board of Governors and House of Delegates of a statement of philosophy on the subject of professional discipline and of a suggestion to those bodies of a comprehensive program (including a Model Disciplinary Code), to be endorsed by the House of Delegates of the American Bar Association if by such House approved, of discipline designed to put that philosophy into practical operation; and

That the duty of the committee with respect to procedure be limited to such, if any, matters as in the opinion of the committee are either susceptible of uniform application or otherwise of general importance.

Chairman James R. Morford, of Delaware, reporting for the Committee on Membership, said that the Association had begun the current fiscal year with 47,560 members and had more than 48,000 at the time of the Annual Meeting. From July 1 to January 31, the Association received 1818 new applications, but during the same time 1749 members were lost due to resignation, death, nonpayment of dues, etc. He said that there were two reasons for the failure to make a larger net gain in membership. He blamed the increase in dues for part of the failure, but added that the effect of the increase had not been so great as feared. Many applications are being held until after April 1, when dues of new members will be credited to 1953 memberships. Mr. Morford said that he thought that normal development and use of techniques would bring an increase of between 2000 and 3000 members annually. Since the Association has only about 21 per cent of the lawyers in the country in its ranks, he suggested that it might be wise to make a single effort in one year to double the membership—possibly as soon as the drive for the American Bar Foundation is finished.

Archibald M. Mull, Jr., of California, Chairman of the Committee on Membership Matters, then made his report. This Committee was appointed to study the memberhip procedures now in use by the Association and the possibility of some system of integrated membership with the state or local associations. The report of the Committee required no action.

Secretary Stecher then announced the nominations by the State Delegates of officers for the year 1953-1954. The list of nominees appears at page 292 of this issue of the JOURNAL.

Thomas J. Boodell, of Chicago, Chairman of the Committee on Unauthorized Practice of the Law, reported on the latest developments in that field. His report required no House action.

Arnold W. Knauth, of New York, Chairman of the Committee on Admiralty and Maritime Law, gave an oral report that required no action.

Loyd Wright, of California, Chairman of the Committee on Lawyers' Indemnity, said that his group was studying the indemnity systems in use by the lawyers in four Canadian provinces, New Zealand and England and said the Committee hoped to have a plan prepared in time for presentation at the Boston Meeting.

The Committee on Military Justice, speaking through Committee member Milton J. Blake, of Colorado, announced that the Legal Assistance Plan, sponsored jointly by the Association and the Armed Forces, has been in effect ten years and has handled some 12 to 20 million cases. He said that the work was continuing and that close co-operation with the Lawyer Referral Service had been obtained.

Barnabas Sears, of Illinois, speaking for the Section of Labor Relations Law, said that the Council of the Section had voted to appropriate $5000 to the American Bar Foundation.

Benjamin Wham, of Illinois, announced that the Council of the Section of Corporation, Banking and Business Law had appropriated $7500 to the same Foundation.

The House adjourned *sine die* at 1:00 P.M.

International Extradition

(Continued from page 300)

treaty to demand that the accused be surrendered for trial.

In the Lo Dolce extradition case, a voluminous record was compiled and forwarded from Italy, which included depositions of witnesses, the confessions of the two Italian partisans, the ballistics test and the report of the autopsy. Quite clearly, if the technical rules of criminal law regarding the admissibility of evidence governed an extradition hearing, it would be necessary to bring all the witnesses over from Italy. The result would be that the hearing in this country would be turned into a trial, which it is not.

At the hearing then, the substantive rights of the accused are determined, namely:

> 1. Whether there is sufficient evidence of criminality according to the law of the place where the accused is found to justify a committing magistrate of that place to hold the accused for trial, had the crime charged been there committed; and
>
> 2. Whether there is jurisdiction under the treaty to hold the accused for extradition.[27]

With regard to the evidence of the guilt of the accused, most extradition treaties have a provision similar to the one contained in the extradition treaty with Italy, construed in the Lo Dolce case. The pertinent part of the treaty reads as follows:

> The Government of the United States and the government of Italy mutually agree to deliver up persons who, having been convicted of or charged with the crimes specified in the following article . . . . *Provided*, That this shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his or her apprehension and commitment for trial, if the crime had been there committed.

The basic purpose of the hearing and the test of the evidence of criminality under such provisions of extradition treaties has nowhere been better summed up than by Mr. Justice Holmes in *Glucksman* v. *Henkel*:[28]

> It is common in extradition cases to attempt to bring to bear all the factitious niceties of a criminal trial at common law. But it is a waste of time. For, while of course a man is not to be sent from the country merely upon demand or surmise, yet, if there is presented, even in somewhat untechnical form, according to our ideas, such reasonable ground to suppose him guilty as to make it proper that he should be tried, good faith to the demanding government requires his surrender . . . . We are bound by the existence of an Extradition Treaty to assume that the trial will be fair.

As other cases state the rule, the treaty requirements are met where the evidence adduced at the hearing shows that there is probable evidence of the guilt of the accused.

Since the evidence has been gathered abroad, it will of necessity be in deposition form, *ex parte* and without the benefit of cross-examination. This of necessity must suffice. To insure this, there is a specific statutory section regulating the introduction of evidence at an extradition hearing.[29] Under this statute the only requirement for the admissibility of evidence obtained abroad is that the consular officer of the United States resident in the foreign country, certify that the documents, affidavits or depositions have been duly authenticated by the judicial authorities of that country so as to permit their introduction in evidence at the trial in the foreign country. Under this statute, it has been repeatedly held that *ex parte* affidavits and depositions secured from abroad, without the right of cross examination, are all admissible, provided only that the statutory requirement of a consular certificate is met.[30]

Since an extradition proceeding is not a criminal proceeding, the strict safeguards which surround the trial of an accused in this country do not apply. Thus, the protection of the Fourth and Fifth Amendments to the Constitution has no application to extradition proceedings. It is immaterial for instance, that the conviction by the demanding government may be upon hearsay testimony. None of these factors constitute any defense to the extradition itself.[31]

The Issue in *Lo Dolce* Was Italian Jurisdiction

In the Lo Dolce extradition case, the issue was not one of probable cause, but of the jurisdiction of the Italian government under the extradition treaty.

The decision denying the Italian government the right of extradition was based upon two grounds:

> 1. The absence of judicial jurisdiction over soldiers serving in the United States Forces in enemy territory.
>
> 2. The absence of jurisdiction of the Italian government over the territory of Northern Italy where the alleged crime was committed.[32]

Two long-standing precedents combined to form the basis of the first ground for the decision. The first was the case of *Coleman* v. *Tennessee* arising out of the Civil War.[33] In that case, a Union soldier had murdered a woman in Tennessee during the course of the occupation of the territory of the State of Tennessee by Northern armies. The Supreme Court held that the State

27. Jurisdiction after arrest may be tested by a writ of habeas corpus, 184 U.S. 270.

28. 221 U.S. 508, 512 (1910).

29. 18 U.S.C., §3190.

30. *Bingham* v. *Bradley*, 241 U.S. 511, 517 (1915); *United States* v. *Mulligan*, 50 F. 2d 687, 688 (2d Cir., 1931); 92 F. 2d 603.

31. *United States* v. *Hecht*, 16 F. 2d 955, 956 (2d Cir., 1927); *In re Neely*, 103 Fed. 626 (Cir. Ct. S.D.N.Y. 1900), *aff'd*, 180 U.S. 109 (1900).

32. At the time this case first came to public attention, the opinion was voiced that the American citizenship of the accused would be a bar to extradition in view of the fact that Italian law prohibits the extradition of its citizens. Citizenship alone, however, would not be a bar to extradition to Italy. It has been clearly held that American citizens may be extradited to Italy even though Italian citizens may not be extradited to this country. The absence of reciprocity is no defense. 229 U.S. 447.

33. *Coleman* v. *Tennessee*, 97 U.S. 509 (1878).

of Tennessee, after it had become again a sister state of the Union, had no jurisdiction to try the accused for murder, that under no circumstances would a former enemy state be permitted to try the soldiers of an invading army for any act committed during the course of the occupation.

In the case of Italy it will be recalled that Italy became a cobelligerent in October, 1943. The alleged crime was committed in December, 1944. The Peace Treaty was not signed until 1947. Under well-established precedent the Italian government remained an enemy until the signing of the Treaty of Peace, thus bringing the case within the scope of the rule of *Coleman* v. *Tennessee*.[34] It was the contention of the Italian government that *Coleman* v. *Tennessee* was inapplicable. That case announced the obvious rule that the courts of an openly hostile country would never be permitted to sit in judgment upon the actions of an invading soldier, a rule which could not be disputed. But, by December, 1944, Italy was only technically an enemy. In every real sense of the word, she was an ally of this country. The real test of *Coleman* v. *Tennessee*, it was submitted, was enmity in point of fact. Nonetheless, the federal court refused to accept this distinction and followed *Coleman* v. *Tennessee*. The other precedent which formed the basis of the first ground of the decision was the case of *Schooner Exchange* v. *McFadden*.[35] There, in a decision by Chief Justice Marshall, the rule was laid down that the entry of foreign troops on the soil of even a friendly nation resulted in a complete waiver of jurisdiction by that friendly occupied nation of any acts committed by the soldiers of the friendly occupying nation. The point implicitly made was that soldiers of the Army of the United States would be immune under the decision of Chief Justice Marshall, even if Italy was considered a friendly nation. The basis of this decision was to insure that the friendly nation maintain complete control and discipline over its troops and was not hampered or interfered with by the local authorities. It is doubtful whether the opinion of Chief Justice Marshall intended to exclude from the judicial jurisdiction of the occupied country any and all acts of the visiting soldiers no matter how unrelated to the course of their military conduct.[36]

It is conceded that immunity must be granted to the extent of insuring that there is no interference with the command of the visiting army. It is quite a different thing to say that any act, no matter how far removed from the continuity of the command, should receive immunity.

In any extradition treaty, the demanding government must show that the crime was one committed within the jurisdiction of the demanding government. Judge John Knight held, in the second ground for the decision, that the absence of dominion and control by the Italian government over the area of Northern Italy resulted in a lack of jurisdiction, under the treaty, over the alleged crime. This is a very important decision as to the meaning of the term "jurisdiction" in an extradition treaty. It equates jurisdiction, as that term is defined in the treaty, with dominion and control, instead of with the term *sovereignty*. Jurisdiction for other purposes, such as the scope of its application under the Federal Tort Claims Act, does not depent upon dominion and control.[37] It was conceded, during the exchange of briefs, that the Italian government retained sovereignty over the area of Northern Italy despite the absence of dominion and control.[38] In short, the alleged crime was one committed within the country of Italy as that term is understood both in a general and legally technical sense. Nonetheless, the fact that the territory in question was part of the country of Italy was not deemed sufficient under the treaty in the absence of actual physical dominion and control over the territory.

In view of the two reasons set forth above, the court held that the Italian government lacked power under the treaty to demand the extradition.

The decision, reaffirming the theory of sovereign immunity, establishes a precedent in the event of future occupation of foreign territories. In an era of fluctuating governments and fluctuating control over territories, it establishes an equally important precedent as to the meaning of the term jurisdiction in an extradition treaty.

34. No judicial authority could be found which effectively defined the status of a cobelligerent.
Though the extradition treaty, suspended during the war, was not revived until 1948, upon revival its provisions became retroactive. *In re* De Giacomo 12 Blatch 391, Fed. Cas: No. 3747; 16 F. 2d 955, 956.

35. 7 Cranch 116 (1812).

36. *Wright* v. *Cantrell*, 44 N.S.W. St. R. 45 (New South Wales Sup. Ct., 1943).

37. *United States* v. *Spelar*, 338 U.S. 217 (1949).

38. The argument was that sovereignty is never held in abeyance, that the temporary occupation by the German forces could not transfer sovereignty, and that therefore the alleged crime was one clearly committed within the country of Italy. *United States* v. *Curtiss Wright*, 299 U.S. 304, 317 (1936); Hackworth, Vol. 6, page 385; *State of Netherlands* v. *Federal Reserve Bank* 99 F. Supp. 655, 661 (U.S. D.C. S.D.N.Y. 1951). Furthermore a crime within the extradition treaty is one committed within the country of the demanding government. Hyde, *International Law*, (2d Rev. Edition) Volume 2, page 44, page 1013; Hackworth Volume 4, page 69. A *fortiori* a crime committed within the country is a crime committed within the jurisdiction of that country.

Selection of Judges in England

(Continued from page 282)

This is not the place to discuss at any length the part which politics and political influence play in the selection of our state and federal judges. But a few things can be said to point the moral in this country of the English practice.

Judges Are Elected in Thirty-five States

Thirty-five of the forty-eight states elect their judges. In the thirteen remaining states judges are appointed by the Governor, usually with the consent of the legislature or of one house of the legislature; but in a few of these thirteen states, Missouri for example, variations of the appointive method are used.[5]

The Constitution of the United States provides that our federal judges shall be appointed by the President with the consent of the Senate; but in practice the senators of a state who are members of the party in power in effect appoint the federal district judges sitting in their state and subject to a power in the nature of a veto of the President, and where neither senator of a state belongs to the President's party, the leaders of that party in the state in effect make the appointment subject to the same veto.

When judges are elected, a judge to attain and hold office must use all the means usually employed by a candidate to win an election; that is, in his struggle for votes, he must advertise his candidacy and must meet as many people as he can and ask politicians, labor union leaders and powerful businessmen, not only for their public support and endorsement, but also quite often for their financial aid in meeting his campaign expenses. The selection of a judge by this method is not only influenced by politics; it is politics itself.[6]

The appointment of our federal judges and the judges of our state courts who are selected in this way is, generally speaking, strongly influenced by politics; that is a federal or state judge is usually appointed, not because he is considered one of the best men available for the place, but because he has been active in party politics or is a friend or protege of some powerful political figure or a controlling political clique.

It is not suggested that the judges of our state and federal courts do not perform their functions conscientiously and with ability; on the contrary the great majority of them do function in exactly that way. But it is suggested that, since the selection of our state and federal judges is either the result of politics or is strongly influenced by politics, the fact that they do function well is more a matter of chance than of deliberate policy.

The Missouri Plan Represents a Great Advance

Missouri has adopted a system which has become known as the Missouri Plan and which undoubtedly represents a great advance in our methods of selecting judges.[7] In general the Missouri Plan provides that three nominees for a place on the appellate courts and certain of the courts of general jurisdiction shall be selected by commissions and that the governor shall select one of such nominees for the office. The commission nominating judges for the appellate courts consists of the Chief Justice of the Supreme Court, three lawyers elected by each of the three appellate districts and three laymen appointed by the Governor, one from each of these districts. The sole function of these commissions is to make nominations and their sole interest should be to nominate the best men regardless of politics.

The Missouri Plan is without question a great improvement over the system of electing judges and over the system of giving a politically elected official the uncontrolled power to appoint them. But it would be naïve to believe that a constitution or a statute can in itself secure and maintain an improvement in any phase of government. The best theory can be perverted to evil ends. Whether it will work well in practice always depends on the standards and morals of the society using it. The Missouri Plan, therefore, is not enough. There must also be a vigorous and effective tradition assuring its successful operation.

It is not easy to say what we should do in the United States to create and enforce such a tradition. As already pointed out, the Inns of Court in England to a large extent have established there the tradition which assures the selection of the best men as judges and keeps politics and political influence out of their appointment; but we cannot imitate the Inns of Court, at least we cannot do so in California, the state with which the writer is familiar. In the

5. The figures contained in this paragraph were taken from Mr. Haynes' book, pages 9-10, which was published in 1944. It is possible, of course, that certain of the states may have changed their method of selecting judges since the publication of this book.

6. This is not the place to discuss how the states electing their judges came to adopt the system, or to engage in any lengthy criticism of it. But it should be mentioned at least in a footnote that it was adopted by those states using it during the period from 1830-1850, not because of faults in the method previously in vogue, but because of the revolutionary ferment demanding greater popular control of government which during that period was taking place in Europe as well as in the United States (Mr. Haynes' book, pages 81-101). And it should be stated that there is no rational basis for the system. A man should be selected as a judge by those who know whether he is fit for the office, whether, in other words, he has the learning, ability, character and temperament to be a judge. It is fantastic to believe that the great majority of the people who vote for a candidate for a judicial office, particularly people in our large cities, can have any knowledge whatever of his qualifications for the office.

7. The plan was adopted by Missouri in 1940; Constitutional Amendment 1940, adding seven new sections to Article 6, printed in laws 1941, page 722. When Missouri adopted a new constitution in 1945, the plan with only one minor change became a part of that constitution; Article 6, sections 29(g) of the 1945 Constitution.

first place conditions in California are entirely different from what they are in England. It was possible to establish the Inns of Court in London because generally speaking the courts and barristers all have their principal offices there; whereas in California the lawyers are scattered miles apart in San Francisco, Los Angeles and the other cities of the state and so the close relationship existing among English barristers is impossible. But if the conditions in California were the same, the only way in which institutions like the Inns of Court could be created there would be by statute, not as in England by force of custom. But the Inns of Court are in effect social relations; one cannot create such relations by law, but only by custom. In addition it seems that it would not be possible to have such a statute adopted in California. Its adoption would be opposed by large sections of our population who would refuse to confer upon organizations of lawyers free of government control the powers over the profession exercised by the Inns of Court. It would also be opposed by many lawyers who would complain that groups in the position of the English Benchers would be close corporations which would perpetuate themselves and tend to use their places in their own interests or in the interest of those represented by them.

Although we could not, even if we would, create in our states institutions like the Inns of Court still there can be no doubt that the American people, and particularly the American lawyers upon whom the burden will principally rest, have the imagination, civic conscience and will power to establish the tradition which is so badly needed. No effort will be made here to suggest any concrete steps which should be taken to achieve this purpose. It can be said, however, that our bar associations should continue and intensify the efforts which they have been carrying on to raise the standards for judges and eliminate politics from their appointment. They have already done much. The American Bar Association, for example, drafted the model law on which the Missouri Plan is based and has been advocating its adoption. Bar associations can without doubt achieve much more. But they should realize that generally speaking resolutions and recommendations accomplish very little unless supported by a tradition and public opinion which the politician having the power of appointment feels constrained to observe.

When by the creation of a tradition like that of the English, which will have a real sanction, the standards for our judges are raised and politics eliminated as far as humanly possible from their appointment, we shall have done much to preserve a political system existing under law, which, as pointed out by Dean Pound in his statement referred to in the beginning of this paper, is essential to the maintenance of our freedom.

Disposition of Partnership Interests

(Continued from page 286)

the surviving partner an option, exercisable within a limited time, to liquidate, incorporate or form a limited partnership. Consideration should be given the terms of such an option agreement.

At he outset it is necessary to determine whether the option is to be applicable not only to death but also to retirement from the firm and to coming under legal disabiliy. If it is to be so applied, use of a general clause to that effect will avoid needless repetition. It may be stated that the term "executor or administrator" for the purpose of the agreement includes the conservator or guardian of a partner's estate, and that the term "death" includes a partner coming under a legal disability.

In an option agreement ordinarily the surviving partner is granted the right either to incorporate the business of the partnershp or to form a limited partnership with the surviving partner as the general, and the estate of the deceased partner as the limited partner.

Issuance of Letters Testamentary or of Administration

There should be set forth the manner in which the option is to be exercised, an example of which might be delivery to the decedent's executor or administrator of a written notice of exercise within sixty days of the issuance of letters testamentary or of administration. There should be recognized the contingency that letters testamentary or of administration may not issue within the specified time, in which case service of notice on the decedent's heirs-at-law should be authorized within a specified period, such as six months after the decedent's death. In case the surviving partner fails to exercise the option within the required time, liquidation would be mandatory. Pending the expiration of the option, continuation of the business would be directed, and for that purpose the surviving partner should be granted all powers the two possessed during their joint lives.

The agreement should enumerate in some detail the rights of the parties and the steps to be taken if incorporation be elected. The decedent's executor or administrator will be required to join with the surviving partner in the incorporation of the business, the division of corporate shares between the two parties being covered by the agreement. The balance of the terms of the articles of incorporation should be left to the discretion of the surviving partner who should also be granted the right to designate within a specified time the partnership assets to be transferred to the corporation. It is convenient to require the designation of assets to be in the instrument electing incorporation. The agreement should require assumption of partnership debts by the corporation and the apportionment of assets which are not to be transferred.

Consideration should be given to permitting certain key employees to become preorganization subscribers for corporate shares. Thus, the surviving partner may be granted the right to authorize not more than five employees to become preorganization subscribers, provided such designated employees are in no event to acquire thereby more than 2 per cent of the corporate shares. In some states issuance of corporate shares to preorganization subscribers is not within the scope of the Blue Sky Law, so that in such states the provision has an additional significance.

Provision for limited partnership should closely parallel provision for incorporation. In states which require a certificate of limited partnership, the agreement should direct the executor or administrator to join in the certificate as well as the limited partnership agreement.

Limited Partnership Terms Should Be Set Forth

The general terms of the limited partnership agreement should be set forth. For example, the agreement may provide that the surviving partner is to be entitled to reasonable compensation for his services; that the general partner shall have the right to accumulate in the business such earnings as shall be reasonably necessary for the efficient continuation of the business, after which all net earnings are to be divided between the general and the limited partner; and that the general partner shall be vested with all the powers that the two partners enjoyed prior to the decedent's death. The general partner may be granted a discretion to incorporate or liquidate, and in case of his death, incorporation or liquidation by his executor should be required.

Under the Uniform Limited Partnership Act a limited partner by exercising control over the business becomes liable for partnership debts. A similar provision is usually found in the laws of states which have not adopted the Uniform Act. In view of the paucity of reported decisions defining control, it is advisable to restrict the powers of the limited partner to those expressly authorized in the limited partnership statute.

Restriction in this manner of the limited partner's powers is especially important when the limited interest passes to a trustee, for otherwise the trustee may incur liabilities of a general partner.

In case of delay in the issuance of letters testamentary or of administration and the exercise of the option by notice to the decedent's heirs-at-law, provision must be made for the surviving partner himself to make the transfer to the corporation or partnership. While such a provision should not be held invalid as a testamentary disposition without the formalities required for a will, it would be well to require ratification of the transfer by the executor when appointed.

Although at common law compensation was not allowed the surviving partner for ordinary services in winding up the partnership, the Uniform Partnership Act expressly allows compensation. If in a state which has not adopted the Uniform Partnership Act, the parties desire the surviving partner to receive compensation for ordinary services in liquidating the business, or if in a state which has

adopted the Uniform Partnership Act, it is desired that the surviving partner receive limited compensation, the partnership agreement should so provide.

Often use of an option agreement is inadvisable. An obvious disadvantage is the uncertainty imposed upon the decedent's executor at the beginning of probate. A far more serious factor, however, is the possibility that the limited partnership may be taxed for income tax purposes as an association.

There is no precise rule to be followed in determining whether a limited partnership is to be taxed as an association. The danger rises or falls as resemblance to corporate form increases or decreases. Although the number of partners of itself should not determine the question, the danger seldom exists when there are two partners, or if the term of the partnership is of short duration.

Consequently, if there is danger of being taxed as an association, it may be advisable to minimize the risk by restricting the duration of the limited partnership so as to make it analogous to a type of liquidating trust which has been held not to be taxable as an association. If the partners are numerous, this may be a helpful expedient, particularly if the surviving partners are granted an option to purchase the estate's interest at the end of the period.

The question is frequently asked "Which is most beneficial, liquidation of the business, a buy-and-sell agreement, continuance of the business, or incorporation?" Without a crystal ball, this is difficult to answer. The preference of the decedent's estate should be in the following order: (1) A buy-and-sell agreement; (2) Liquidation; (3) Incorporation.

If a partner insists on retaining for his estate any substantial control over the business, incorporation is advisable, for otherwise individual liability for partnership debts may be imposed on the estate. Even if control is not a determining factor, if no tax problem is presented, incorporation may be expedient.

When, however, federal taxes are a factor and there is danger that the partnership, if continued indefinitely, would be taxed as an association, preference may be given to a limited continuance provided a part of the decedent's interest is required to be liquidated on death through a buy-and-sell agreement, and the surviving partners are granted an option to purchase the remainder of the decedent's interest at any time prior to the expiration of the continuation period.

In determining the method of ascertaining the purchase price under such an option, care should be exercised that no incentive be offered the surviving partner to minimize earnings during the continuation period. Thus, if the value of good will is to be based on average earnings, it is generally advisable to provide a minimum value. This may be the date-of-death value.

One reason for the high mortality in closely held businesses is the common failure to provide for their continuation after the death of a partner. This is important not only to the owners of the businesses but also to the public generally. To a considerable extent our economy is influenced by closely held businesses for they have brought us many comforts and to a marked degree have raised our standard of living. Were it not for the foundations laid by them, we today would not have many of our industrial giants. Their seemingly remote predecessors were all started and developed as closely held businesses and one has only to look at a recent list of large corporations to see how constantly this process is recurring. If our system of free enterprise is to continue, a substantial part of our wealth must be in closely held businesses. In working in this field, therefore, attorneys have not only the opportunity to materially assist their clients but also to perform a service to our country.

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